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UBI SUMUS? QUO VADIMUS?[1]: CHARTING THE COURSE OF MARITIME INTERCEPTION OPERATIONS

Lieutenant Commander Richard Zeigler, JAGC, USN[*]

I. INTRODUCTION

A. *The Problem and the Analysis*

It is commonly said that what is past is prologue,[2] indicating that what has occurred before is introductory to what will occur in the future. It is also commonly said that those who fail to remember the past are condemned to repeat it,[3] which, of course, implies that by studying the past it is sometimes possible to avoid its mistakes in the future. Assuming the correctness of these two propositions, the purpose of this paper is to study the prologue, that is, the history, legal justification, and the three actual cases of maritime interception operations conducted thus far, learn the lessons of this past, and provide recommendations to avoid the mistakes of the past in future operations. In other words, and to paraphrase Professor Hattendorf, the purpose of this paper is to let us ask, "Where are we?" with respect to maritime interception operations, before asking, "Where are we going?"[4]

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[1] UBI SUMUS? THE STATE OF NAVAL AND MARITIME HISTORY 1 (John B. Hattendorf, ed., 1994) Professor Hattendorf states, at 1: "Navigators need to ask 'Where are we?' [*Ubi sumus*?] before they can ask 'Where are we going?' [*Quo vadimus*?]."

[*] *Lieutenant Commander Richard Zeigler, JAGC, USN, is currently on active duty in the Navy Judge Advocate General's Corps.*

[2] JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES,PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 224 (Justin Kaplan, ed., 16th Ed. 1992) (quoting THE TEMPEST, 2.1.261).

[3] *Id.* at 588 (quoting GEORGE SANTAYANA, THE LIFE OF REASON).

[4] Hattendorf, *supra* note 1, at 1.

Throughout much of 1994, the United States and various alliance and coalition partners conducted maritime interception operations in three different parts of the world: against Iraq in the Persian Gulf and Red Sea; in the Adriatic Sea off the coast of the former Yugoslavia; and, in the Caribbean Sea off the coast of Haiti. In fact, the maritime interception operations (MIOs)[5] against Iraq have been in effect for over four years at the time of this writing.

Significantly, all MIOs thus far conducted have been multinational, at least in name. Moreover, the combined (i.e., multinational) nature of MIOs is consistent with much of American military history. After all, from the French and Indian Wars and the American Revolution, through two world wars, Korea, and Vietnam, American military forces have operated in combined forces. Combined operations are undoubtedly a fact of future U.S. armed conflicts.

Inherent in any multinational operation are potential stumbling blocks, such as problems with command and control, rules of engagement, and communications. Where MIOs are truly unilateral, these problems simply do not exist except insofar as the nation conducting an operation is ineffective in managing such issues.

While the three MIOs studied here have been multilateral in name, they have been, with the exception of the Sharp Guard[6] part of the Adriatic MIOs, national in practice. The key aspects of these operations, such as command and control, rules of engagement, and communications were left to individual nations, even though all nations involved were attempting to accomplish the same mission at the same time in the same place.[7]

In spite of their respective successes, it is clear that the multilateral-in-name/national-in-practice nature of MIOs presents a sometimes dangerous, inefficient, and ineffective way of conducting such operations. As stated in Committee Four (Indian Ocean and Arabian Gulf) of the Twelfth International Seapower Symposium, held at the U.S. Naval War College in November 1993:

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[5] The term "MIOs" is used throughout for the sake of consistency and clarity.

[6] Unless specifically noted otherwise, the use of "SHARP GUARD" denotes all Western European Union (WEU) and North Atlantic Treaty Organization (NATO) operations within the larger Adriatic MIOs.

[7] There are exceptions to the multilateral-in-name/national-in-practice nature within the operations. For instance, WEU and NATO forces conducted separate, then unified, multilateral operations in the case of the Adriatic MIO.

> [Maritime interception] is clearly a growth area for naval operations, but there is a lack of standard procedures and training for the forces of different states. Currently, therefore, this subject tends to be chaotic and confusing. . . . [S]tandard basic doctrine and procedures for maritime [interception] are urgently needed.[8]

This paper presents a review of the historical and legal foundations of MIOs, conducts an examination and analysis of the three MIOs identified above, and, finally, offers recommendations for improvement. The analysis consists specifically of the following: (1) a review of the historical roots of MIOs, including blockade, visit and search, pacific blockade, and quarantine; (2) a review of the legal justifications for the use of MIOs, including both customary international law and the United Nations Charter; and, (3) an analysis of the three MIOs to date to identify strengths and weaknesses and offer recommendations for improvement.

The case study analysis focuses on certain aspects critical to any such operation such as command and control, rules of engagement, and communications, to determine how to work around[9] problem areas inherent in multinational operations. The Sharp Guard part of the Adriatic MIOs is presented as the safest, most effective manner in which to conduct such operations. The analysis here examines the difficulties of all three MIOs and provides workarounds by which future non-alliance MIOs can be conducted more safely, efficiently, and effectively. The paper suggests that a close study of the past reveals solutions for past problems so as to avoid them in future operations. As Sharp Guard and the proposed workarounds demonstrate, safe, efficient, effective multilateral operations are not only possible, they will be the MIOs of the future.

B. *Background*

The United Nations has "authorized more peacekeeping operations since 1988 than in the previous 40 years."[10] Since 1990 three MIOs have been

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[8] NAVAL WAR COLLEGE TWELFTH INTERNATIONAL SEAPOWER SYMPOSIUM REPORT 166 (1993).

[9] From these two words comes the word "workaround," a noun denoting the methods employed to work around a particular problem.

[10] JEFFREY I. SANDS, BLUE HULLS: MULTINATIONAL NAVAL COOPERATION AND THE UNITED NATIONS, CNA Research Memorandum 93-40 (Alexandria, VA: Center for Naval Analyses, 1993), 1.

conducted around the world; at times simultaneously. Clearly, such operations will be used frequently in the future.[11] The form of MIOs evolved from the longstanding rights of belligerents as those rights developed in the customary international law of neutrality. The legal justification of MIOs rests on two possible bases: customary international law pertaining to forcible self-help and the international law of the United Nations Charter, though in each of the three cases studied, authority was provided by the United Nations Security Council.[12]

MIOs have become an important weapon in the coercive measures arsenal of both the United Nations and multilateral, or regional, organizations recognized by the United Nations, such as the North Atlantic Treaty Organization, the Gulf Cooperation Council, and the Organization of American States. MIOs are one of the mechanisms, short of war, by which the United Nations or multilateral organizations enforce economic sanctions against an offending state (hereinafter referred to as a "target state"). Generally, they are used to force a target state to conform to international law as interpreted by the United Nations Security Council or multilateral organization. MIOs offer several distinct qualities that encourage their frequent use.

First, because the United States and other significant powers operate navies around the world, and certainly near the historic global flashpoints, such as the Persian Gulf, MIOs offer a rapid response to a developing crisis. This sort of rapid response allows for a demonstration of resolve by the sanctioning body and provides an almost instant deterrent force against further aggression. U.S. doctrine emphasizes that "[b]y demonstrating national resolve and maintaining the ability to deal successfully with threats to the national interests, we deter those who would use military power against us."[13] MIOs can demonstrate resolve and provide deterrence effectively, whether unilateral or multilateral.

While demonstrating resolve and providing deterrence, MIOs also serve as an ideal tool for controlling rather than escalating a crisis. MIOs are

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[11] *See*, Adam B. Siegel, *Enforcing Sanctions: A Growth Industry*, 46 NAV. WAR COLL. REV. 130-34(1993). *See also*, Eugene V. Rostow, *Is U.N. Peacekeeping a Growth Industry?* JOINT FORCE Q. 100 (Spring 1994); Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFFAIRS 71, 89-102 (Winter 1992-93).

[12] The United States and Great Britain, under the customary law of collective forcible self-help, conducted MIOs in the Gulf Crisis prior to U.N. Security Council authorization. *See* Chapter V, *infra*.

[13] U.S. DEPT. OF DEFENSE, JOINT DOCTRINE CAPSTONE AND KEYSTONE PRIMER 1 (1994).

remarkably flexible, and can be as forceful as the sanctioning body desires. Therefore, at the initial stages of a crisis, MIOs can be tailored to avoid actual armed exchanges, such as shadowing a targeted freighter instead of using disabling fire against it. This allows the sanctioning body the time and breathing room to negotiate a peaceful resolution. The United Kingdom Ambassador to the United Nations, Sir Crispin Tickell, remarked: "[E]conomic sanctions should not be regarded as a prelude to anything else. Here I obviously refer to military action. Rather, economic sanctions are designed to avoid the circumstances in which military action might otherwise arise."[14]

Third, while MIOs allow for escalation control, they also enable the sanctioning body to control both the flow of arms and other goods into the target state and the flow of products out of the target state. This, of course, provides leverage during crisis negotiations, and, if negotiations fail, MIOs have placed the forces of the sanctioning body at an advantage since the target state has not improved its war fighting ability, at least with respect to resupply.

MIOs conducted against Iraq, in the Adriatic Sea, and against Haiti have all been successful, even where the larger missions have not. In each case the rapid response of MIOs deterred further aggression or further violation of international law, stanched the flow of trade into and out of the target state, and controlled escalation of the respective crisis. Nevertheless, confusion about the nature and practice of MIOs has led to misunderstanding. Moreover, the nations conducting MIOs encountered numerous difficulties in the operations that led to risk, inefficiency, and ineffectiveness. In other words, past MIOs were successful not because of their multinational-in-name/national-in-practice nature, but in spite of it.

There are countless examples of problems with the actual conduct of the operations, particularly in the area of the rules of engagement. For example, Rear Admiral John R. Brigstocke, RN, noted the following problem:

> I was authorized in the Adriatic to provide my sea harriers and the Sea Shua-armed Lynx aircraft to support the NATO embargo operation and to provide surface combat air patrol. The trouble is that when the aircraft took off from my carrier, they were under UK national rules of engagement, which differed markedly from the NATO rules of engagement for the embargo operation. So, in mid-flight, with twenty-two year old, highly inexperienced, gung-ho pilots in the cockpit, those aircraft changed their ROE

[14] U.N. SCOR, 46th Sess., 2933rd mtg at 27, U.N. Doc. S/PV 2933(1990).

> and changed their commander, halfway between me and flying over the force just off the Montenegrin coast.[15]

Such problems have occurred in all MIOs conducted thus far.

It is clear that MIOs are a large part of the future of maritime economic sanction enforcement. They appear to be the first mechanism to which the United Nations and regional organizations will turn, in a graduated response, when they target aggression and recalcitrance. As stated by Derek Boothby, Head, European Division, Department of Political Affairs, United Nations:

> The present operations in the Adriatic Sea by NATO and the Western European Union, and the naval ships now off Haiti enforcing United Nations Security Council sanctions--all are examples of recent, cooperative maritime operations. And . . . there will indeed be an increasing number of tasks at the lower end of the scale of naval operations. So, in sum, there is a rising need.[16]

There is simply no doubt that MIOs will be used in the future, and probably with great frequency. Unilateral action by nations has been superseded, to a large degree, by the U.N. Security Council acting under the U.N. Charter. War, as it was conducted for centuries, will not be a frequent occurrence in the foreseeable future. In its place the Security Council will take action to resolve disputes. Many scenarios will likely include the use of MIOs.

II. HISTORICAL ROOTS[17]

The roots of MIOs are found in the history of the law of neutrality, including blockade and visit and search, and the law of pacific blockade and

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[15] TWELFTH SEAPOWER SYMPOSIUM REPORT, *supra* note 9, at 68.

[16] *Id.* at 99.

[17] The classic accounts of the law in this area are contained in the following: L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, 621-879 (H. Lauterpacht ed., 7th ed., 1952); C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 475-853 (6th rev. ed., 1967) and, D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 1094-1158 (I.A. Shearer ed., 1984).

quarantine.[18] A brief examination of each of these forms of maritime interdiction will provide the standards and norms which lend predictability to MIOs. While the United States has been on the enforcing side in all three MIOs thus far conducted, this may not always be the case. It is incumbent upon the United States to continue to lead in forging standards and norms, to ensure that international law conforms to U.S. interests. The development of MIOs standards and norms are discussed in this Section, which traces the historical evolution of maritime interdiction.

A. *Mare Liberum v. Mare Clausum*

MIOs, like any other action that impedes absolute freedom of navigation of the high seas, must contend with a fundamental controversy of maritime international law: *mare liberum v. mare clausum*; roughly translated as free seas versus closed seas. The struggle between these two concepts, waged for centuries, influences MIOs in that such operations are designed to, and in fact do, impose the concept of *mare clausum* on otherwise free seas.[19]

In the Third Century A.D., the Roman jurist, Ulpian, wrote: "*Mare quod natura omnibus patet*," which is translated as: "The sea is open to everyone by nature."[20] This notion of free seas encountered opposition in 1582, when Bodin "wrongly ascribed to Baldus the idea that governmental power was exercisable over shipping within sixty miles from the coast."[21] The view that sovereignty of the sea was possible emerged when Hugo Grotius, father of international law, published, in 1608, his great work, *Mare Liberum*, in which he "set out to vindicate the rights to trade . . . upon the theory that the seas are avenues of commerce which of their nature are not susceptible of appropriation."[22] English jurists argued persuasively in favor of the view that the seas are subject to sovereignty based primarily upon Christian notions of man's dominion over the earth, and it was not until 1700 that the controversy

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[18] Another operation that may have had an influence upon MIOs was the Beira Patrol, though that was a U.N. directed, unilateral British effort. *See* Adam B. Siegle, *Naval Forces in Support of International Sanctions, The Beira Patrol*, 46 NAV. WAR COLL. REV. 102 (1992).

[19] O'Connell *supra* note 17, at 3.

[20] Quoted in L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 582, note 1 (H. Lauterpacht, ed., 8th ed. 1955).

[21] O'Connell, *supra* note 17, at 3.

[22] *Id.* at 9.

was decided in favor of *mare liberum*. Constraints on this freedom, then, are a significant issue in the development of international law.

B. *The Law of Neutrality*

Mare liberum, free seas, is an ideal affected by the reality of international relations and war. Where a nation at war perceives that it is in its interests to restrict its enemy from international trade, it will impose itself into this trade thereby restricting the ideal of freedom of the seas.

Recognizing that the reality of war would result in some forms of restrictions on freedom of the seas, international law developed a means to limit the restrictive effects. This means is known as the law of neutrality, the "principal purpose [of which] is the regulation of belligerent activity with respect to neutral commerce."[23] The law of neutrality:

> establishes a balance of interests that protects neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.[24]

Thus, while freedom of the seas could be constrained to some limited extent in the interests of belligerent rights, the seas were to remain as open as reasonably possible. Contraband, blockade, and visit and search are all concepts in the law of neutrality that enable that law to maintain the desired balance.

While not an enforcement mechanism, the notion of contraband is important to the law of neutrality. "Contraband consists of goods which are destined for the enemy of a belligerent and which may be susceptible to use in armed conflict."[25] The traditional distinction between absolute contraband (e.g., weapons or munitions) and conditional contraband (e.g., food or fuel) was blurred by World War II practices on both sides, and today almost any product could be considered contraband if so identified by an enforcing state, the Security Council, or legitimate regional organization. The belligerent rights of

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[23] U.S. DEPT. OF THE NAVY, NAVAL WARFARE PUBLICATION 9, REV. A(NWP 9), THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS/FMFM 1-10(hereinafter NWP 9) ¶7.4 (1989).

[24] *Id.*

[25] *Id.* at ¶7.4.1.

blockade and visit and search exist so that a belligerent may restrict the flow of contraband into or out of an enemy state.

C. *Blockade*

Blockade, the father of maritime interdiction mechanisms, has a long history. The first blockade was likely that conducted by the Athenians in 425 B.C. at the island of Sphacteria, whereby the Spartan garrison on the island was forced to surrender.[26] Over the centuries the practice of blockade and the pressure of neutrals in the interest of liberal commerce developed certain requirements that were necessary for any blockade to be legitimate. A blockade must be specifically established, or declared, by the government of the belligerent nation; neutral vessels and aircraft must be notified of the blockade; the blockade must be effectively maintained to render ingress or egress dangerous; the blockade must be applied impartially to all nations; and the blockade must have limitations so that it does not bar access to neutral ports and coasts.[27] Where the belligerent nation has met all of the above criteria, the blockade is legitimate and can be legally exercised.[28]

In modern armed conflict, technology has permitted, even demanded, certain variations on the traditional blockade. For example, the long distance blockades of the belligerent in World Wars I and II departed substantially from these traditional requirements. Moreover, a traditional, close-in blockade would be impossible to maintain against a well-equipped modern belligerent since one's own ships would be extremely vulnerable to modern weapons technology.

Nevertheless, it is important to maintain blockade as a separate form of maritime interdiction and to maintain the criteria identified above since traditional blockade is not totally obsolete.[29] For example, the U.S. blockade

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[26] HELMUT PEMSEL, A HISTORY OF WAR AT SEA 13-14 (1975).

[27] NWP 9 at ¶7.7.2.1.

[28] The use of blockade must meet the tests of necessity and proportionality. *See* JAMES J. MCHUGH, NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, *Forcible Self-Help in International Law*, contained in READINGS IN INTERNATIONAL LAW, 139-163 (Richard B. Lillich and John Norton Moore, eds., 1980).

[29] Some commentators disagree with the view that traditional distinctions should be maintained within maritime interdiction. *See* CDR Jane Gilliland Dalton, JAGC, USN, *The Influence of Law on Seapower in Desert Shield/Desert Storm*, 41 NAV. L. REV. 81 (1993); and Robert E. Morabito, *Maritime Interdiction: Evolution of a Strategy*, 22 OCEAN DEVELOPMENT AND INTERNATIONAL LAW

of "Haiphong and other North Vietnamese ports . . . was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality."[30] Moreover, in spite of some views that "war is now outlawed under the U.N. Charter," it is likely that war between nations will continue, in spite of the best efforts of the United Nations, and that these wars may include the use of traditional blockade. To blur the distinctions may lead to misunderstanding in the international community. For example, had the United States used the term "blockade" to characterize its actions in the Persian Gulf in August 1990, perhaps the broad international support it was able to develop over time would have been more difficult to garner since a blockade is known to be an act of war.

Perhaps most importantly, the effects of violating a blockade can be quite severe. For example, vessels that attempt to run a blockade may be captured by the blockading force and sent to a belligerent port as "prize" for adjudication by a prize court.[31] This is not necessarily so with other forms of maritime interdiction, particularly with MIOs. In MIOs, capture and prize adjudication are not even contemplated.[32] Rather, vessels in violation are only "diverted" to another port, the crew, freight, and vessel simply being prohibited from entering a port of the target state. Clearly, the distinctions are necessary and useful.

D. *Visit and Search*

Another belligerent right that has developed in the law of neutrality is visit and search. Through visit and search, a belligerent seeks to control the flow of contraband on the high seas. Through this mechanism, visit and search of neutral vessels is conducted on the high seas by the vessels and forces of a belligerent nation. Visit and search, in short, is a means by which a belligerent:

> [M]ay determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature

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301 (1992).

[30] NWP 9 at ¶7.7.5.

[31] NWP 9 at ¶7.9. *See* MILLER, Belligerency and Limited War, in READINGS IN INTERNATIONAL LAW (Lillich and Moore) *supra* note 17, at 166.

[32] *But see* S.C. Res. 820, U.N. SCOR, 3200th mtg, U.N. Doc S/PV.3200 (1992), which authorized the sale of both violating vessels and the cargo of violating vessels in the Adriatic operations.

> (contraband or exempt "free goods") of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict.[33]

Several restrictions apply to visit and search:

> Neutral vessels engaged in government noncommercial service may not be subjected to visit and search. Neutral merchant vessels under convoy of neutral warships of the same nationality are also exempt from visit and search . . . .[34]

Needless to say, neutral warships are not subject to visit and search.[35] NWP 9 sets forth clear procedures for the conduct of visit and search.[36]

MIOs clearly acquire some of their characteristics from visit and search. Indeed, the concepts and conduct of visit and search is what gives MIOs teeth. Nevertheless, the same distinctions as those discussed with respect to blockade must be maintained for the very same reasons.[37] Visit and search is a belligerent right. MIOs are an economic sanction enforcement mechanism conducted under circumstances that do not amount to war. The consequences for violators in visit and search are severe. Where a vessel is discovered with contraband destined for the enemy, or if the vessel resists visit and search, the crew is subject to detention and the goods and vessel may be captured and sent to a belligerent port as a "prize" for adjudication by a prize court.[38] In MIOs,

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[33] NWP 9 at ¶7.6.

[34] NWP 9 at ¶7.6.

[35] *Id.*

[36] NWP 9 at ¶7.6.1.

[37] For an analysis of the extensive "visit and search" operations in the Iran-Iraq War, *see* David L. Peace, *Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis*, 31 VA. J. INT'L L. 545 (1991).

[38] NWP 9 at ¶7.9. The crew must be repatriated as soon as circumstances reasonably permit. NWP 9 at ¶7.9.2.

on the other hand, a vessel in violation is merely "diverted," its crew and cargo left intact.[39]

E. *Pacific Blockade*

A third, and very close, ancestor of MIOs is pacific blockade. Pacific blockade is distinguished from traditional blockade primarily by the fact that it does not involve belligerency. It is designed to control the flow of commerce of a target state in order to maintain peace.[40] Pacific blockade can be defined as follows:

> The cutting off of access to or egress from a foreign port or coast by a naval operation designed to compel the territorial sovereign to yield to demands made of it, and by a process whereby the blockading state does not purpose to bring about a state of war.[41]

Pacific blockade has been used numerous times in the past.[42] For example, Great Britain, France, and Russia conducted a pacific blockade of Morea in 1827 to keep the Turkish Fleet confined to Navarino.[43] A British and French blockade of the Netherlands in 1833 forced the Dutch to comply with treaty obligations providing for Belgian independence.[44] A six-nation coalition

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[39] But note that in the Adriatic MIOs, the United Nations authorized the sale of violating vessels and the sale of their cargoes.

[40] *See* Walter R. Thomas, *Pacific Blockade: A Lost Opportunity of the 1930's,* (Lillich and Moore) *supra* note 28, at 197-200. *See also* Neill H. Alford, Jr., *Modern Economic Warfare (Law and the Naval Participant)*, in 56 NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, 273 (1963) contained in *Readings in International Law* from the NAV. WAR COLL. REV. 1947-1977, Rident B. Lillian and John Norton Mook, eds., 1980). For an extensive study of pacific blockade, *see* ALFRED E. HOGAN, PACIFIC BLOCKADE (1904).

[41] W. Gentler, Background Information on the Legal Employment of Blockade and Related Measures of Naval Economic Interdiction, Unpublished memorandum (1961), quoted in Thomas David Jones, *The International Law of Maritime Blockade--A Measure of Naval Economic Interdiction,* 26 Howard L. J. 759 (1983).

[42] *Supra* note 40, at 198. Thomas *supra* cites "20 *collective* pacific blockade cases effectively recorded before World War II."

[43] *Id.*

[44] *Id.*

blockaded Crete in 1897 against the delivery of weapons to Greek insurgents.[45] Great Britain, Germany, and Italy imposed a pacific blockade against Venezuela in 1902 in an attempt to force Venezuela to pay its debts.[46]

Professor Thomas concludes that the above-noted blockades were "both pacific and effective and demonstrated how *combined* naval action could create stability within an area."[47] And while the name is self-contradictory (i.e., by definition, under customary international law, blockade is a belligerent right), pacific blockade clearly can be useful. The *combined* nature and the effectiveness of past pacific blockades demonstrate that MIOs are direct descendants of pacific blockade. Both pacific blockade and MIOs seek to coerce compliance through peaceful, yet, if necessary, forcible means.

The only characteristics that distinguish pacific blockade and MIOs are the fact that pacific blockade, to be legitimate, must be both effective and impartial, whereas MIOs need be neither. On the other hand, pacific blockade historically was imposed collectively by world powers, and, therefore, the measures of effectiveness and the impartiality of enforcement were decided by those powers. As a result, these two characteristics that seem to distinguish pacific blockade and MIOs may, if in fact, do nothing of the sort. It could well be argued that MIOs are merely the late-20th century version of pacific blockade.

F. *The Cuba Quarantine*

The other great influence on MIOs was the Cuba Quarantine.[48] The Quarantine developed out of the unique tensions and threats of the Cold War. Recognizing the high risk involved in taking armed action against the Soviet Union and Cuba, the United States employed the techniques of visit and search

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[45] *Id.*

[46] Gentler, *supra* note 41, at 15.

[47] Thomas, *supra* note 40, at 198.

[48] *See* ELIE ABEL, THE MISSILE CRISIS (1966); ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (1974); ROBERT A. DIVINE, THE CUBAN MISSILE CRISIS (1971); GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1971); and, DAVID DETZER, THE BRINK: THE CUBAN MISSILE CRISIS 1962 (1979).

in a non-belligerent environment to force the Soviet Union to withdraw the Cuban missile threat.[49]

U.S. intelligence sources determined in mid-October 1962 that medium range ballistic missile sites were under construction in Cuba, and that large numbers of Soviet advisors had arrived in Cuba.[50] This was viewed by U.S. policy-makers as a grave threat to the security of the nations of the Western Hemisphere, and particularly to the security of the United States.[51] U.S. policy-makers considered options ranging from purely diplomatic discussions with the Soviet Union to the invasion of Cuba.[52] In the middle of the option list were blockade and air strike. There were sound reasons to use a blockade. Namely, the U.S. Navy controlled the seas around Cuba, blockade demonstrated U.S. resolve to the Soviets, and blockade controlled escalation in the way MIOs have been used to control escalation. The significant drawback to blockade was that it was, and is, considered a belligerent act of a nation at war.[53]

The United States took evidence to the Organization of American States (OAS) to enlist the support of that regional organization in framing a response. With OAS support, President Kennedy chose to use some of the concepts of blockade, but, to avoid the legal consequences associated with the term blockade, the United States termed its actions a "Quarantine." The Quarantine was placed into effect at 1000 on October 24, 1962. After significant tensions throughout numerous parts of the operation, Soviet ships carrying missiles to Cuba turned around short of the Quarantine line, and the crisis was averted.

The Quarantine, however, was put into place for the same reasons that MIOs are used, was sanctioned by a regional organization, was defended as a measure in compliance with the United Nations Charter, and proved to be

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[49] The Cuba Quarantine arguably was the first MIO since it seems to share the same standards and norms. The key difference between the two actions is that quarantine is not an economic sanction enforcement tool. Rather, it was used simply to stop the flow of nuclear missiles from the Soviet Union to Cuba, and also to force the withdrawal of those missiles already in Cuba. MIOs, on the other hand, are designed to enforce economic sanctions against a target state.

[50] Abel, *supra* note 48, at 29.

[51] *Id.*

[52] *Id.* at 79.

[53] *Id.* at 62.

effective without the use of actual force.[54] In both the Quarantine and MIOs a regional organization has used maritime interception to coerce a target state to comply with what that regional organization has determined to be the rule of law. The advantages of MIOs are seen in the use of Quarantine--a rapid response by the regional organization deterred the offending conduct, stanched the flow of targeted trade into and out of the target state, and controlled escalation of the crisis. Clearly, then, the Cuba Quarantine is the father of MIOs.

G. *The Derivation and Norms of MIOs*

MIOs clearly derive, in part, from all of the concepts discussed in this chapter. MIOs are a legitimate form of *mare clausum*, and have roots in blockade and visit and search. However, blockade and visit and search are distant ancestors in that they are belligerent rights while MIOs are not. By their very nature blockade and visit and search are aggressive, hostile maritime interdiction methods, *against an enemy*. MIOs are closer to the concepts of pacific blockade and quarantine, as they are designed to resolve disputes peacefully, but allow limited and controlled force to be used, if necessary.

The legal norms of MIOs derive from this same ancestry. Legal norms permit some predictability in the actions of nations. Thus, where a blockade is established, both belligerent and neutral nations can know what to expect from all parties involved. Likewise, where a belligerent nation announces its intentions to exercise its right of visit and search, neutral nations can know what to expect when their merchant vessels encounter the warships of that belligerent on the seas. MIOs, a relative newcomer to international law, also have established legal norms.[55]

The distinctions between the various forms of maritime interdiction are critical, and were well articulated by Secretary-General Perez de Cuellar, when he stated, in discussing the Persian Gulf Crisis:

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[54] The United States intended to attack Cuba on October 30, 1962 unless the Soviet Union withdrew the missiles. Allison, *supra* note 48, at 46.

[55] Admittedly, four years of MIOs is not a long time to establish customary international law. However, MIOs have a long ancestry and appear to be only another offspring of the larger theme of maritime interdiction. In this respect its norms are controlled by its roots. Also, the three MIOs have been nearly unanimously observed and respected by the international community.

> The U.N. needed to demonstrate that: the way of enforcement was qualitatively different from the way of war; as such action issued from a collective engagement, it required a discipline all its own; it strove to minimize undeserved suffering to the extent humanly possible and to search for solutions for the special economic problem confronted by states arising from the carrying out of enforcement measures; what it demanded from the party against which it was employed was not surrender but the righting of the wrong that had been committed and it did not foreclose diplomatic efforts to arrive at a peaceful solution consistent with Charter principles and the determinations made by the council.[56]

Thus, as noted in the Introduction, MIOs are generally an early step in a graduated program to coerce compliance by the target state. They are designed to be limited, peaceful to the maximum extent possible, proportional, and non-escalatory. To remain a viable tool in these respects, MIOs must remain distinguishable from other legitimate, but quite different, forms of maritime interdiction.

If an interdiction mechanism has no teeth, it likely will not be effective. For example, in writing of the Adriatic MIOs, Adam B. Siegel argued in the NAVAL WAR COLLEGE REVIEW that "[e]mbargo patrols are ineffective without the right to use force, if necessary, to stop ships."[57] Today's technology, however, provides the tools to enforce sanctions without the exchange of fire. For instance, the vertical takedowns of vessels by U.S. Coast Guard Law Enforcement Detachments (LEDET) have, so far in MIOs, resulted in successful inspections without weapons exchanges.[58] In the three MIOs thus far conducted, force was authorized to enforce the sanctions. But the force used in

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[56] "A momentous significance well beyond the crisis. . . ." , 27 U.N. CHRONICLE 22 (1990) The Secretary-General's stated justification resembles a justification based upon the customary international law concept of reprisal.

[57] Adam B. Siegel, *Enforcing Sanctions: a Growth Industry,* 46 NAV. WAR COLL. REV. 130, 132 (1993).

[58] *See* U.S. Dept. of Defense, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS PURSUANT TO TITLE V OF THE PERSIAN GULF CONFLICT SUPPLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991 (PUBLIC LAW 102-25) 49-62(1992) (hereafter "GULF WAR, FINAL REPORT"). Research has revealed no cases of death resulting directly from weapons exchanges in MIOs thus far conducted. Research has further revealed thousands of interceptions, hundreds of boardings, and hundreds of diversions in the MIOs thus far conducted.

MIOs is limited, usually to warning shots, and is controlled at the highest political levels. Political leaders often strictly control the use of force so as to prevent escalation. MIOs offer a flexibility that decision-makers find attractive. They can authorize force to the extent that they wish, provided such force fits within the legal justification for the MIOs, either through customary international law or the baseline enabling document (i.e., a resolution) of the U.N. Security Council or a regional organization. Thus, force, while a part of every form of maritime interdiction, is much more limited in MIOs than in most others.

A comparison of the various forms of maritime interdiction mechanisms reveals the similarities and distinctions among their respective norms. Figure II-1 (following page) provides such a comparison.

The norms of MIOs, derived from the long history of the struggle between *mare liberum and mare clausum*, blockade, visit and search, pacific blockade, and quarantine, are, therefore, clear. Future operations should meet these norms to ensure legitimacy.

FIGURE II-1
MARITIME INTERDICTION
MECHANISMS--NORMS COMPARED

	Blockade	Visit/ Search	Pacific Blockade	Quar- antine	MIOs
Establishment	x	x	x	x	x
Notification	x		x	x	x
Effectiveness	x		x		
Impartiality	x		x		
Limitations	x	x	x	x	x
Use of Force	x	x	x	x	x[59]
Clearcerts[60]	x	x	x	x	x
Applicable to neutrals	x	x	x	x	x
Belligerent Right	x	x			
Sanction Enforcement Mechanism		x			x
Effect of violation	prize	prize	divert	divert	divert[61]

[59] In MIOs, the use of force is limited not only by international law, but by the baseline enabling document. The result is that MIOs have seldom, if ever, utilized actual force beyond warning shots.

[60] CLEARCERTS, short for clear certifications, are essentially preauthorization to transit the area of operations. The British call them navicerts. A merchant vessel, made aware of the MIOs through a Notice to Mariners (NOTAM) , may divert itself to a particular port, identified in the Notice, to obtain certification that its cargo is clear and free of contraband and to obtain authorization to proceed in accordance with its schedule.

[61] The Security Council authorized the confiscation of violating vessels and the seizure of their cargo only in the Adriatic MIO. S.C. Res. 820, U.N. SCOR. 3200th mtg, U.N. Doc S/PV.3200 (1993).

III. LEGAL JUSTIFICATION

As previously noted, MIOs conducted thus far have relied upon U.N. authorization. The one exception were the MIOs conducted by the United States and Great Britain in the initial days of the Persian Gulf Crisis, which were actions of collective self-defense. Still unresolved is the legitimacy of these actions given the U.N. Charter. The Chapter does not attempt to resolve the question. Rather, it focuses on the conceptual legal bases for MIOs, and discusses them in light of their multinational nature.

Historically, blockade and the other parts of the law of neutrality were justified by their development in customary international law. Multinational maritime interception operations are a creature of the post-World War II era, and rely upon the United Nations Charter for their justification. This is critical because the form of MIOs is controlled by the Security Council or regional organization resolutions authorizing them. Thus, when planning and executing MIOs, the commander must conform to the baseline enabling documents (e.g., the Security Council resolutions).

A. *Customary International Law*

Customary international law developed several concepts over time to enable nations to respond to aggression. It continues as the basis of action in spite of its oft-perceived supersession by the law of the United Nations Charter. Such response is generally known as forcible self-help, and there are three types of forcible self-help: (1) self-defense; (2) reprisal; and, (3) intervention.[62]

1. *Self-Defense*

The best explanation of the customary right of self-defense was provided by Daniel Webster when, as Secretary of State, he analyzed the case of the CAROLINE.[63] The CAROLINE, an American-owned boat, was believed by the British to have been used to transport men and war material to Canadian rebels. The British crossed over to the American side of the Niagara River and sent the CAROLINE over Niagra Falls. In the process, several American citizens were killed. This incident inflamed passions on both sides of the Atlantic. In an exchange of diplomatic notes, the British defended their

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[62] McHugh, *supra* note 28, at 139-163.

[63] Martin A. Rogoff and Edward Collins, Jr., *The CAROLINE Incident and the Development of International Law*, 16 BROOK. INT'L L.J. 493 (1990).

action as an act of anticipatory self-defense. As Secretary of State, Webster was tasked with framing the American response. McHugh summarizes Webster's conclusions regarding the use of self-defense as follows:

- Its exercise must be in response to actual or threatened violence.

- The actual or threatened violence must be of such a nature as to create an instant and overwhelming necessity to respond, and

- The response taken must not be excessive or unreasonable in relation to the violence being inflicted or threatened.[64]

While scholars may argue with the vagueness of Webster's analysis, that analysis has come to form the basis of modern views of self-defense -- it must meet tests of both necessity and proportionality.[65]

The effect of this analysis is apparent since MIOs are limited, measured responses to violations of international law, such as a threat of force, the actual use of force, or even internal political revolution or instability. By their very nature, they would rarely, if ever, be excessive or unreasonable. In this respect, MIOs are ideal for reacting within the boundaries of the customary international law of self-defense.

2. *Reprisal*

The second form of forcible self-help, reprisal, also provides a sound legal justification for MIOs within the customary international law. Reprisal is a means of forcible self-help to redress wrongs already inflicted.[66] Its origins are to be found in the long history of private reprisals achieved by the seizure of goods and property on the high seas by individuals who believed that they had been wronged.[67] Public reprisals became a part of the customary international law of forcible self-help in the 18th and 19th centuries. The guiding principles

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[64] McHugh, *supra* note 28, at 143-44.

[65] McHugh, *supra* note 28, at 143. Vagueness and ambiguity can be advantageous in both domestic and international law, as it allows for flexibility.

[66] *Id.*

[67] *Id.* at 144.

of reprisal in modern international law derive from the NAULILAA case of 1928. They are distilled by McHugh as follows:

- There must have been an illegal act on the part of the target state.
- Demand for redress must be made and redress not provided, and
- The measures taken must not be excessive, i.e., out of all proportion to the act which motivated them.[68]

These norms, too, may be criticized as vague, but they, like Webster's analysis, have withstood the tests of time and practice.

MIOs could easily be justified on the basis of reprisal. Where another state commits an illegal act and demands of redress have not been complied with, MIOs can be tailored within the bounds of "excessive force" to force redress. According to McHugh, blockade was viewed historically as a form of reprisal.[69] However, as McHugh admits, "It has been widely conceded that [reprisal] is now generally unacceptable."[70] While other scholars may view blockade simply as one of many belligerent actions taken during the course of a war that is fought in self-defense, the fact remains that reprisal is a viable justification for the use of MIOs.

3. *Intervention*

The third type of forcible self-help in customary international law is intervention. Intervention is "more a method of applying force than a conceptual basis or justification for its use."[71] There is some historical basis for intervention, and it is generally regarded as legitimate. Intervention is the present basis, albeit via United Nations action, for most armed responses to aggression.

B. ***Law Under the U.N. Charter***

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[68] *Id.* at 145.

[69] *Id.* at 144.

[70] *Id.* at 150-51.

[71] *Id.*

The United Nations Charter sets forth a scheme for dispute resolution which seems to abrogate the use of unilateral force except in self-defense. The scheme favors the peaceful resolution of disputes, but it permits forcible action by the Member Nations upon Security Council direction if peaceful measures fail.[72]

Pursuant to Article 2 of the Charter: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security are not endangered."[73] Article 2 further states that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[74]

Chapter VI, Article 33 calls for settlement of disputes by "peaceful means of [the parties'] choice."[75] The Security Council is permitted to become involved in such disputes only in an advisory and investigatory capacity.[76]

If settlement fails and a dispute becomes a threat to peace, or if there is any act of aggression, the dispute is within Security Council responsibility. Although the Charter favors peaceful resolution, Article 41 authorizes the Security Council to use measures short of armed force, such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[77] If these measures fail, the Security Council:

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[72] It has been said that "[t]he United Nations system is an elegant, carefully crafted instrument to make war illegal and unnecessary." Thomas M. Franck & Faiza Patel, *Agora, The Gulf Crisis in International and Foreign Relations Law*, 85 AM. J. INT'L. 63 (1991). The issue of the legitimacy of using force where the Security Council has failed to act, or has acted ineffectively, remains a pressing one.

[73] U.N. CHARTER, Art 2, para 3.

[74] U.N. CHARTER, Art 2, para. 4.

[75] U.N. CHARTER, Art 33, para. 1. Among the possibilities listed are "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement [and] resort to regional agencies or arrangements."

[76] U.N. Charter, Art 33, para. 2 and U.N. Charter, Art 34.

[77] *Id.* at 11.

> may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[78]

Article 43 calls upon the Member states to "make available to the Security Council . . . armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security."[79] The Charter contemplates the establishment of a Military Staff Committee to assist the Security Council in the use of force.[80] Finally, Article 48 requires Member states to "carry out the decisions of the Security Council for the maintenance of international peace and security."[81]

One of the most significant and controversial articles in the Charter is Article 51, which states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[82]

Nations may act in self-defense in accordance with customary international law only until the Security Council has taken measures necessary to maintain international peace and security. Where a nation acts in self-defense, reports the act to the Security Council which takes measures to maintain international peace and security, the individual nation is precluded from further unilateral or non-

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[78] *Id.*

[79] *Id.*

[80] *Id.* at 11-12.

[81] *Id.* at 12.

[82] *Id.* at 12-13.

sanctioned collective action in its own self-defense, unless the Security Council found later that it could not take necessary action.[83] No nation is expected to allow itself to be overrun by another state, and a nation may act in self-defense, even in anticipatory self-defense. Once the Security Council assumes responsibility for a dispute by taking action, the individual state must allow the international community to resolve the dispute.[84]

There are numerous critics of this view.[85] It has been argued that a state acting in individual or collective self-defense may do so even where such action is in direct conflict with action of the Security Council.[86] When analyzing the Persian Gulf Crisis, Eugene V. Rostow argued:

> [T]he Charter rule is that the exercise of the right of self-defense does *not* suspend the jurisdiction of the Security Council and that the assumption of jurisdiction by the Security Council does *not* suspend the "inherent" right of self-defense of states to defend themselves. Under the Charter, the Security Council has the last word, and can stop a war of self-defense by deciding it has become a breach of the peace. But there is all the difference in the world between a right of self-defense which evaporates when an item is put on the Security Council's agenda and a war of self-defense which can be

[83] This specific issue could have arisen in the Persian Gulf Crisis. Assume that the Security Council was unable to pass any resolution after Resolution 661, which called for the embargo of trade to and from Iraq and Kuwait, but did not specifically authorize any enforcement mechanism. Could the United States, after having been requested to do so by the exiled government of Kuwait, have lawfully undertaken maritime interception operations unilaterally? The United States did just that, between August 16, 1990, when it began interception operations, and August 25, 1990, when the Security Council authorized forcible enforcement measures.

[84] This view is supported by many, including the United Nations itself. During the Persian Gulf Crisis, Secretary General Perez de Cuellar stated that "only the United Nations, through its Security Council resolutions, can really decide about a blockade." Patrick E. Tyler and Al Kamen, *American Blockade is Criticized at U.N.*, WASH POST, Aug. 14, 1990, at A1. The U.N. General Assembly has voiced its view about the use of force under the Charter. *See* U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028/SR.2625 (1971).

[85] McHugh, *supra* note 28, at 139-63.

[86] D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 195-197 (1958).

> stopped only by a Security Council resolution subject to the veto of the permanent members.[87]

This is a realistic view since no nation is going to suspend its option of self-defense where its very existence is at stake simply because the Security Council may take action to assist it.

This issue is important for MIOs, since they have been multinational operations and must have some multinational authorization to be legitimate. In some cases, MIOs will be sanctioned by a United Nations resolution. It is conceivable that MIOs will be conducted without resolutions, but still pursuant to Charter provisions pertaining to "Regional Arrangements." MIOs, as the offspring of blockade, also may have been justified under the customary international law of reprisal, and "[o]f the three categories of forcible self-help . . . the law of reprisals has probably been most severely limited since the adoption of the U.N. Charter. It has been widely conceded that this method of self-help is now generally unacceptable."[88] Thus, it would seem almost inconceivable that MIOs will be conducted without some form of U.N. sanction. Nevertheless, there is little doubt that both the United States and Great Britain would have continued MIOs in the Persian Gulf Crisis on the basis of collective self-defense, absent a U.N. resolution authorizing such actions. The hard question arises when individual or collective self-defense is merely the ostensible justification masking aggression. This is an issue with which scholars and decision-makers will continue to struggle.

C. *The Basic Tenets*

In international law there are two pillars supporting the use of force during armed conflict: necessity and proportionality. It is generally recognized that these two must be balanced in practice. William O. Miller analyzed the two pillars and concluded:

> The essential thrust of these rules for warfare at sea has been to reserve for the belligerent, within the bounds of humanitarianism, the right to attack those objects which were recognized as *legitimate military objectives*. It also provided the belligerent with the right to use such force as may be

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[87] Eugene V. Rostow, *Until What? Enforcement Actions or Collective Self-Defense?*, in *Agora: The Gulf Crisis in International and Foreign Relations Law*, 85 AM. J. INT'L. L. 513 (1991).

[88] McHugh, *supra* note 28, at 150-51.

> necessary to attain his objective, while at the same time providing protection--as was physically possible under the circumstances--to noncombatants who may become involved and to survivors of the action.[89]

Thus far, all MIOs, except the U.S. and British MIOs in the early days of the Gulf Crisis, arose from U.N. Security Council resolutions which, as representative of international will, have decided the necessity and proportionality issues for the international community. All that was left in the execution was the need to conform to the baseline enabling documents (i.e., the resolutions).

Regardless of the legal justification (i.e., under customary international law or under the U.N. Charter), MIOs conform to the spirit of the basic tenets of the use of force in international law; namely, necessity and proportionality. By nature, MIOs are extremely limited in the use of force, and will seldom, if ever, fail to meet the test of proportionality.

IV. THE THREE CASES--SITUATIONS AND LEGAL JUSTIFICATIONS

There have been three multinational MIOs conducted thus far.[90] The first, against Iraq in both the Persian Gulf and Red Sea, began in August 1990 and continues at the time of this writing. The second began in the Adriatic, off the coast of the former Yugoslavia, and it, too, is still in existence. The third was in the Caribbean Sea off the coast of Haiti. This operation was concluded when President Aristide was returned to power in Haiti in October 1994.

An analysis of each of these MIOs will reveal their form and their problems, and will provide a road map by which to plan future operations.[91]

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[89] Miller, *supra* note 28, at 264.

[90] Neither pacific blockades nor more recent operations such as the Cuba Quarantine and Beira Patrol are included in this figure. These are viewed as ancestors of MIO.

[91] Where the MIOs are multinational, compliance with the authorizing resolutions is critical to legitimacy.

A. *The Persian Gulf Conflict*[92]

On August 2, 1990, Iraqi military forces launched an unprovoked invasion of neighboring Kuwait and occupied it within days. World reaction, as embodied in the U.N. Security Council, was swift, united, and decisive. On August 2, 1990, the U.N. Security Council passed Resolution 660 condemning the invasion and demanding the immediate and unconditional withdrawal of Iraqi forces from Kuwait.[93] On the same day the United States responded with Executive Orders 12722 and 12723, which froze Iraqi and Kuwaiti assets in the United States and banned all U.S. trade with and travel to Iraq and Kuwait.[94] Likewise, France and Britain froze Iraqi and Kuwaiti assets. Both the Soviet Union and the People's Republic of China acted, banning all arms shipments to Iraq and Kuwait. Regionally, the Gulf Cooperation Council "condemned this brutal Iraqi aggression against the fraternal state of Kuwait."[95] On August 5, 1990, the European Community imposed a boycott of all oil imports from Iraq and Kuwait and also imposed an embargo against all arms going to Iraq or Kuwait.

The United Nations Security Council then enacted Resolution 661, imposing an embargo on the import of "all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution." It also imposed an embargo on the export of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait.[96]

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[92] For the most complete analyses of the Persian Gulf Crisis, *see*, GULF WAR, FINAL REPORT *supra* note 58; John Norton Moore, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW (1992); and, Lawrence Freedman and Efraim Karsh, THE GULF CONFLICT 1990-91: DIPLOMACY AND WAR IN THE NEW WORLD ORDER (1993). For thorough analyses of the Gulf Crisis MIOs, *see* CDR Jane Gilliland Dalton, JAGC, USN, *The Influence of Law on Seapower in Desert Shield/Desert Storm*, 41 NAV. L. REV. 54 (1993).

[93] S.C. Res. 660, U.N. SCOR, 2932nd mtg, U.N. Doc. S/PV.2932 (1990).

[94] Exec. Order No. 12722 and 12723, 55 Fed. Reg. 31803-31806 (1990).

[95] Letter from the Permanent Representative of Oman to the United Nations (Aug. 3, 1990). U.N. Doc. S/21430.

[96] S.C. Res. 661, U.N. SCOR, 3933rd mtg, U.N. Doc. S/PV. 3933 (1990).

Based on this resolution, the Kuwaiti request and the inherent right of self-defense, the United States decided to undertake maritime interception operations. This decision was problematic because the resolution did not specifically authorize unilateral or multilateral interception operations. All the resolution did was call for an embargo of both imports and exports of Iraq and Kuwait. Nevertheless, the United States construed the resolution most broadly and chose to "interdict any tanker approaching an oil terminal and instruct its captain to leave the area, citing enforcement powers granted by [Resolution 661]."[97] Other nations, including Great Britain, similarly construed the resolution and sent warships to the area. On the other hand, some nations, most vociferously Cuba, construed the resolution more narrowly and urged the Security Council to condemn any unilateral enforcement actions.[98] U.N. Secretary-General Perez de Cuellar seemed to agree with the Cuban position when he said that "only the United Nations, through its Security Council Resolutions, can really decide about a blockade."[99] Despite his misuse of terminology, he was correct, given the language of Articles 41 and 42 of the Charter. Specifically, Article 41 allows the Security Council to take action, short of armed force, to "give effect to its decisions."[100] Article 42 allows the Security Council, where action under Article 41 has been deemed inadequate, to:

> take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[101]

The Charter envisions U.N. action once the Security Council has undertaken responsibility to resolve the dispute.

Once the Security Council acts under Chapter VII, as it did in enacting Resolution 661, it assumes responsibility for the situation, and unilateral action

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[97] Molly Moore, *U.S. May Seek Multinational Blockade Force*, WASH POST, Aug. 7, 1990, at A1.

[98] *See*, U.N. SCOR, 46th Sess., 2934th mtg, U.N. Doc S/PV. 2934 (1990), at 24-25.

[99] Thomas M. Franck and Al Kamen, *American Blockade is Criticized at U.N.*, WASH. POST, Aug. 14, 1990, at A1.

[100] Sohn, *supra* note 73, at 11.

[101] *Id.*

is normally no longer an option. Here, Resolution 661 provided action through the peaceful embargo of trade, and did not specifically authorize military enforcement actions. The resolution, on the other hand, also contained the following language: "The Security Council . . . Affirm[s] the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."[102] Moreover, it stated: "[N]othing in the present resolution shall prohibit assistance to the legitimate Government of Kuwait."[103] If the Security Council intended for Kuwait and its allies to act under the customary law of self-defense, U.S. and British action in unilaterally imposing enforcement action of Resolution 661 was lawful.[104]

The United States and Britain sent warships to the Persian Gulf and Red Sea and began an operation to intercept inbound and outbound commerce from Iraq and Kuwait. For a short period, this "unilateral" action resulted in difficulties. On August 18, 1990, USS REID (FFG 30) intercepted the Iraqi oil tanker, AL KHANAQIN, which was transiting Iranian territorial waters in an obvious attempt to avoid the interception operation. Based upon her deep draft, REID determined she was fully loaded as she made a course toward Iraq. REID forced the AL KHANAQIN to change course to the southwest, and her master claimed she was headed for Aden. Before she could enter Omani territorial waters REID fired 25-mm and .76-mm warning shots across her bow. The AL KHANAQIN continued to evade REID. REID continued to track the AL KHANAQIN until USS GOLDSBOROUGH (DDG 20) took over. Ultimately, the AL KHANAQIN was allowed to proceed when Yemen made it known that it would support the U.N. resolutions and that it would not allow the AL KHANAQIN to offload her cargo.[105] This action led to Iraqi condemnation based upon its view the United States had imposed "an economic blockade by force of arms against Iraq," and that such was "an act of war under world norms and international law."[106] Had the U.N. Resolution not been

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[102] S.C.Res 661, U.N. SCOR, 3933rd mtg, U.N. Doc S/PV.3933 (1990).

[103] *Id.*

[104] It is likely that U.S. policy-makers took advantage of creative ambiguity in helping to craft the language of Resolution 661.

[105] CDR Tom Delery, USN, *Away, the Boarding Party,* 117 U.S. NAVAL INSTITUTE PROCEEDINGS 67 (1991); William Claiborne, *U.S. Ships Fire Warning Shots at Iraqi Tankers; Baghdad Escalates Threats Against Foreigners,* WASH. POST, Aug. 19, 1990, at A1.

[106] Claiborne, *supra* note 105, at A30.

ambiguous concerning unilateral action, Iraq may have been correct. As it was, the U.S. action fell within its broad reading of Resolution 661, and there was little outpouring of sympathy for Iraq. Further U.S. action, however, irritated other nations. For example, Jordan's commerce was affected by the interception operations, and Jordan complained to the U.N. concerning U.S. actions.[107]

The decision by U.S. policy-makers to avoid attacking the recalcitrant Iraqi vessels was part of its effort to convince the U.N. to allow just such action. The U.S. believed that unilateral forcible action would have resulted in a failure to build an international consensus for such action.[108] Less than a week later, the U.N. Security Council passed Resolution 665, which called upon:

> member states cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990);

and invited member states:

> accordingly to co-operate as may be necessary to ensure compliance with the provisions of resolution 661 (1990) with the maximum use of political and diplomatic measures, in accordance with paragraph 1 above;

and requested all states:

> to provide in accordance with the Charter such assistance as may be required by the States referred to in paragraph 1 of this resolution.[109]

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[107] Letter from the Permanent Representative of Jordan to the United Nations (Aug. 20, 1990), U.N. SCOR, U.N. Doc. S/21571 (1990).

[108] Molly Moore *supra* note 97 at A16; Fred Barnes, *No Offense: American Military Options Kuwait,* THE NEW REPUBLIC, Sept. 24, 1990, at 15.

[109] S.C. Res 665, U.N. SCOR 2938th mtg., U.N. Doc. S/PV. 2938 (1990).

Resolution 665 mooted the issues created by unilateral enforcement actions.[110] The Persian Gulf Conflict is an excellent example of a two-level legal justification. Initially, the United States, Britain, and others acted unilaterally under the inherent right of individual and collective self-defense. Later, these nations acted under the authority of the U.N. Charter. The unresolved issue is the legality of unilateral action after the Security Council acts to assume responsibility. The U.S. maritime interception action between 18 and 25 August 1990 was legal, given the broad language contained in Resolution 661.

B. *The Federal Republic of Yugoslavia*

The situation giving rise to U.N. action in the Adriatic Sea off the coast of the Federal Republic of Yugoslavia (FRY)[111] has a long and complex history. From the "Great Schism" of 1054 to the present day, the Balkans region has been a hotbed of unrest. Following World War II, Marshall Tito consolidated power under communism and quelled the unrest until his death in 1980. The nation fell apart when the Communist Party chose to allow political pluralism and that pluralism degenerated into near anarchy, only ten years after Tito's death. Fighting began almost immediately, and by September 1991, the date of the first U.N. Security Council Resolution on the FRY, it became clear to the international community that inaction risked total war within the FRY and potentially a more general conflagration with international ramifications.[112]

Recognizing the crisis as a serious one, the United Nations Security Council enacted Security Council Resolution 713, which stated:

> for the purposes of establishing peace and stability in Yugoslavia, [all States shall] immediately implement a general

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[110] As of the end of Desert Storm, twenty-three nations had participated in the multinational interception force. GULF WAR, FINAL REPORT at 65.

[111] The current Federal Republic of Yugoslavia comprises Serbia and Montenegro. The former Federal Republic of Yugoslavia was composed of Serbia, Montenegro, Croatia, Bosnia, and Macedonia. The Federal Republic of Yugoslavia (FRY) referred to in this paper is the original incarnation.

[112] *See* Ambassador Edward J. Perkins, *Aggression by the Serbian Regime,* U.S. DEPT. OF STATE DISPATCH, June 8, 1992, at 448, regarding U.N. Security Council Resolution 757 (1992), in which the Ambassador identifies the "brutal aggression" and the "campaign of terror" wrought by Serbia and Montenegro. Security Council Resolution 757 (1992) states: "NOTING that in the very complex context of events in the former Socialist Federal Republic of Yugoslavia all parties bear some responsibility for the situation." S.C. Res. 757, U.N. SCOR, 3082nd mtg, U.N. Doc S/PV. 3082 (1992).

> and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise.[113]

At this time, however, there was no enforcement mechanism for the embargo. Understanding that the crisis would continue unabated without further action, the Security Council enacted Resolution 757 on May 30, 1992. In pertinent part, it required all States to prevent:

> (a) The import into their territories of all commodities and products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro) exported therefrom after the date of the present resolution;
>
> (b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro). . . .
>
> (c) The sale or supply by their nationals or from their territories or using their flag vessels or aircraft of any commodities or products, whether or not originating in their territories . . . to any person or body in the Federal Republic of Yugoslavia (Serbia and Montenegro).[114]

Based upon this language, both the North Atlantic Treaty Organization (NATO) and the Western European Union (WEU) began maritime operations to "monitor" the flow of commerce into and out of the FRY.

These operations, Operation Maritime Monitor (NATO) and Sharp Vigilance (WEU), did only what their respective names imply--they monitored and vigilantly observed compliance/non-compliance with U.N. Security Council Resolutions 713 and 757.[115] Boardings, inspections, and diversions were not authorized. The sole function of the interception forces was to interrogate

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[113] S.C. Res. 713, U.N. SCOR, 3009th mtg, U.N. Doc. S/PV. 3009 (1991).

[114] S.C. Res. 757, U.N. SCOR, 3082nd mtg, U.N. Doc. S/PV. 3082 (1992).

[115] ADM J. M. Boorda, USN, *Loyal Partner: NATO's forces in support of the United Nations,* 39 NATO'S SIXTEEN NATIONS 8,12 (January 1994).

vessels, inform those vessels of any violations of Resolutions 713 and 757, and report results.[116] Given such limited authorization, violations were predictable. By establishing proof of such violations, however, these two initial operations laid the groundwork for future, tougher resolutions to enforce the embargo.[117]

Maritime Monitor and Sharp Vigilance provided sufficient information about violations to enable, in November 1992, the Security Council, "[a]cting under Chapters VII and VIII of the Charter of the United Nations," to pass Resolution 787, which called upon all States,

> acting nationally or through regional agencies or arrangements, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions of resolutions 713 (1991) and 757 (1992).[118]

Out of this resolution came NATO's Operation Maritime Guard and WEU's Operation Sharp Fence.[119] Resolution 787 called upon states to actually enforce Resolutions 713 and 757 rather than simply monitor the seas off the coast of the FRY. As NATO and the WEU attempted to enforce the sanctions, violators discovered that they could defeat the enforcement by transiting the territorial seas of Montenegro. Maritime Guard and Sharp Fence documented and reported the violations, and the Security Council reacted with Resolution 820, which stated that the Security Council "decides to prohibit all commercial maritime traffic from entering the territorial sea of the Federal Republic of Yugoslavia."[120]

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[116] *Id.* at 9.

[117] *Id.*

[118] S.C. Res 787, U.N. SCOR, 3137th mtg., U.N. Doc. S/PV. 3137 (1992).

[119] Boorda, *supra* note 115, at 10.

[120] S.C. Res. 820, U.N. SCOR, 3200th mtg., U.N. Doc. S/PV. 3200 (1993) [hereinafter Resolution 820). "FRY" is used here in its current sense, to include only Serbia and Montenegro.

Because of this resolution, Maritime Guard and Sharp Fence were combined into one operation, Sharp Guard,[121] which continues, somewhat modified, to the time of this writing. The original reason for separate operations was France's interest in participating without being controlled by the United States through NATO.[122] When it became clear that conducting two separate operations was inefficient and risky, France conceded and the operations were consolidated.

C. *Haiti*

The historical interaction between the U.S. and Haiti has been complex. Not long after Jean-Bertrand Aristide, a defrocked Catholic priest, was elected to the office of President of Haiti in early 1991, a military coup led by General Raoul Cedras forced Aristide into exile. Cedras instituted a military dictatorship. This caused, over time, a mass exodus of Haitians from their homeland in ramshackle boats. Many emigrants died by drowning or from exposure in their efforts to reach the United States. Those that survived were intercepted by U.S. Coast Guard or Navy vessels and placed into refugee camps.

This general unrest led President Bush to declare, on October 4, 1991, in Executive Order No. 12775, a national emergency to defend against a threat to the national security, foreign policy, and economy of the United States.[123] This order blocked U.S. financial dealings with Haiti. Executive Order No. 12779, of October 28, 1991, added trade sanctions against Haiti, prohibiting the export to Haiti of U.S. manufactured goods, technology, and services and further prohibiting the importation of Haitian manufactured goods and services.[124] This situation continued until June 30, 1993, when President Clinton, in Executive Order No. 12853, expanded the sanctions by blocking assets of Haitian nationals that had supported the Cedras regime. Moreover, that order implemented U.N. Security Council Resolution 841 of June 16, 1993 by prohibiting U.S. arms and petroleum trade with Haiti.

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[121] Boorda, *supra* note 115, at 10.

[122] *See* CAPT Fabian Hiscock, RN, *Operation Sharp Guard,* 82 NAV. L. REV. 224 (1994).

[123] Exec. Order No. 12,775, 56 Fed. Reg. 50, 641 (1991).

[124] Exec. Order No. 12,779 56 Fed. Reg. 55,975 (1991).

Sanctions were lifted in August 1993 as a result of what was perceived by the world community to be a move by Cedras toward reinstituting the democratically elected Aristide government. In fact, U.N. Security Council Resolution 841 (1993) suspended the petroleum and arms sanctions. Furthermore, the Organization of American States encouraged its member nations to suspend their respective trade embargoes. Agreement was reached with the Cedras regime in what was called the Governor's Island Agreement.[125] However, by mid-October 1993, it was obvious that Cedras would not honor his commitments in the agreement,[126] and the United Nations Security Council issued Resolution 873 (1993), which terminated the suspension of the sanctions. President Clinton reinstituted U.S. sanctions and ordered a six-ship task force to deploy to the coast of Haiti.

The U.N. Security Council issued Resolution 875, calling upon Member States, acting either nationally or through regional organizations, to halt all maritime shipping inbound to Haiti for inspection for arms or petroleum and, if necessary, to order diversion. This resolution led to the creation of the multinational maritime interception force off Haiti. The Haiti MIOs began in earnest in 1994.

By July 1994, it became apparent that sanctions alone would be inadequate to restore democracy in Haiti. The Security Council then issued Resolution 940 (1994), authorizing the "use of all means necessary" to restore Aristide to power in Haiti. The United States led a twenty-six nation coalition effort to bring about compliance and on September 18, 1994, U.S. armed forces deployed to Haiti to restore Aristide to power. Last minute negotiations led to a peaceful resolution to the crisis. Cedras agreed to step down and allow Aristide to return to power. On September 25, Aristide requested the lifting of all economic sanctions against Haiti. The Security Council, in Resolution 944, terminated all sanctions, effective upon Aristide's return to Haiti in October 1994. Aristide returned to Haiti in October 1994 and the sanctions were lifted.

The Haiti MIOs were considered effective, even if their national rather than integrated multinational conduct made them difficult.

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[125] *See* Ian Martin, Haiti: *Mangled Multilateralism,* FOREIGN POLICY (Summer 1994), at 72.

[126] A salient example was the USS HARLAN COUNTY's inability to disembark at Port-au-Prince after troops were "driven" from port by "a hostile demonstration of armed thugs." Martin, *supra* note 125, at 73. This was just one in a series of serious incidents, which included murder of Aristide's Minister of Justice and the withdrawal of Organization of American States/United Nations human rights observers.

V. THE CONDUCT OF THE OPERATIONS

The United Nations provided, through Security Council resolutions, a clear legal mandate for conducting maritime interception operations in each of the three cases. The critical issues of MIOs, such as command and control, rules of engagement, and communications, however, were problematic in each case except for the Sharp Guard part of the Adriatic MIOs. While each case presents certain, limited distinctions in the conduct of operations, the critical issues were similarly resolved in each case. The operations, while multilateral on their face, were primarily national in practice and none was effectively interoperable. The United States and most other nations, for domestic political purposes, insisted that their respective forces would not be placed under the control of either another nation's military or any U.N. entity, such as the Military Staff Committee.[127] By doing so, a critical and pervasive potential problem developed. Command and control, and consequently, most other key aspects of the maritime interception operations, were conducted nationally, without common rules of engagement (ROE), communications, or language, and without an open sharing of intelligence, doctrine and publications, or public affairs efforts.[128]

The attendees of the Twelfth International Seapower Symposium discussed the problems associated with "ad hoc" multinational MIOs. As Vice Admiral Buis stated: "We will operate together in the future, so let us prepare."[129] By failing to prepare, the forces at sea will be left with the burden of not only conducting the operation, but conducting it without benefit of practiced teamwork. If, as U.S. doctrine maintains, "Joint Warfare is Team Warfare," it follows that combined warfare is team warfare.[130] Historically, multinational MIOs have not practiced team warfare. However, the actual daily detection, surveillance, query, boarding, and inspection were consistent, as most nations developed methods and learned from one another through cooperation.

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[127] S.C. Res. 665, U.N. SCOR, 2938th mtg., U.N. Doc. S/PV.2938 (1990) [hereinafter Resolution 665]. *See also* John M. Groshko, *U.N. Approves Use of Force for Iraqi Embargo,* WASH. POST, Aug. 26, 1990, at A1.

[128] GULF WAR, FINAL REPORT *supra* note 58, at 65.

[129] Vice Admiral Nico W.G. Buis, Royal Netherlands Navy, Remarks at the Twelfth International Seapower Symposium (November 1993), in TWELFTH SYMPOSIUM REPORT, *supra* note 8, at 68.

[130] U.S. DEPT. OF DEFENSE, JOINT WARFARE OF THE U.S. ARMED FORCES, Joint Publication 1 (1991), cover quote.

A. *The Day-to-Day Operations*[131]

Nations developed the methods for conducting the day-to-day techniques of MIOs during the Persian Gulf Crisis. Initially, the techniques were wholly *ad hoc*. Over time, however, the various nations involved, through coordination meetings and the informal sharing of experiences, developed consistent, practical techniques for detection, surveillance, query, boarding, inspection, and clearance/diversion.

> M[aritime] I[nterception] O[perations] centered on surveillance of commercial shipping in the Persian Gulf, the Gulf of Oman, the Gulf of Aden, the Red Sea, and the eastern Mediterranean Sea, supported by worldwide monitoring of ships and cargoes potentially destined for Iraq, Kuwait, or Al-'Aqabah. When merchant vessels were intercepted, they were queried to identify the vessel and its shipping information (e.g., destination, origination, registration, and cargo). Suspect vessels were boarded for visual inspection, and, if prohibited cargo were found, the merchant ship was diverted. Rarely and only when necessary, warning shots were fired to induce a vessel to allow boarding by the inspection team. As an additional step, takedowns--the insertion of armed teams from helicopters--were used to take temporary control of uncooperative, suspect merchant vessels that refused to stop for inspection.[132]

It is clear from this description, multilateral MIOs would be very difficult to conduct without significant control of the forces involved. In a situation where the U.N. or a regional organization seeks to control a percolating conflict rather than esçalate it, close control of all forces is necessary. Where one nation interprets "hostile intent" and "hostile act" differently than another nation, certain actions could lead to an undesired escalation of the conflict or to unreasonable risk to MIO participants.

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[131] A key aspect to the effectiveness of economic sanctions is the necessity to halt the flow of supplies into the target state from land borders. MIO can be effective, but if supplies reach the target state by overland routes, economic sanctions will fail. In Haiti, for example, the Dominican Republic agreed to allow a multinational force to enforce the U.N. sanctions on its border with Haiti.

[132] GULF WAR, FINAL REPORT, *supra* note 58, at 53. *See also, Severing Saddam's Lifeline: Maritime Interception Controls the Flow to Iraq*, ALL HANDS Special Edition, 1991, at 10; Dalton *supra*, note 29, at 54.

B. *The Critical Aspects of MIOs*

The aspects critical to all MIOs are command and control, rules of engagement, communications, doctrine and publications, language, intelligence, logistics, and public affairs management. Where problems develop in any of these areas, the success of the operation is at risk.[133] Interoperability is the key to the success of any operation. U.S. policy seeks to achieve unity of effort, centralization of planning, and decentralization of execution through enhanced interoperability.

U.S. statements on joint and combined warfare start with the seminal principle of unity of effort. Joint Publication 1 states: "Success in war demands that all effort be directed toward the achievement of common aims."[134] The need for unity of effort is as important to combined as it is to joint operations. U.S. military leaders recognize that "[t]here is a good probability that any military operations undertaken by the [U.S.] will have **multinational** aspects, so extensive is the network of alliances, friendships, and mutual interests established by our nation around the world."[135] Thus, as with joint operations, unity of effort is the starting point for combined operations, including MIOs.

The difficulty of achieving unity of effort is heightened by a diverse group of nations, each dependent upon domestic political sensitivities, each seeking the opportunity to lead its own forces, if not the whole of the coalition forces, and each working from different rules of engagement, publications, training, and communications. Simplicity, clarity, and readiness are the key requirements for success for combined operations.[136] While unity of effort is the seminal principle for combined operations, success is also dependent upon centralized planning and decentralized execution.[137]

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[133] This paper analyzes only the command and control, rules of engagement, and communications aspects of MIOs, as they are representative of the interoperability problems of all of the key aspects identified.

[134] U.S. DEPT OF DEFENSE, JOINT WARFARE OF THE U.S. ARMED FORCES, 1 *supra* note 130, at 21.

[135] *Id.* at 41.

[136] *Id.*

[137] *Id.* at 36.

The critical aspects of MIOs, enumerated above, are the critical issues pertaining to unity of effort, centralized planning, and decentralized execution. Significantly, all other aspects of military operations, including MIOs, flow from command and control. Given sound, effective command and control structure, the chance of success is enhanced significantly since all other critical aspects will follow.

U.S doctrine on joint and combined operations states:

> Ensure unity of effort under the responsible commander for every objective. . . . Unity of effort, however, requires coordination and cooperation among all forces toward a commonly recognized objective, although not necessarily part of the same command structure. . . . In multinational and interagency operations, unity of command may not be possible, but unity of effort becomes paramount.[138]

It is important to recognize that while unity of command is desirable, in reality it is unlikely in combined operations. Thus, unity of effort, through coordination and cooperation, becomes more significant. Command and control, while perhaps not unified, still plays the key role in leading participants in the necessary coordination and cooperation.

While each of the three MIOs differed slightly from the others with respect to command and control, it is safe to say that in each, operational command and control were not centralized in one commander. This is true even of the Adriatic MIOs as a whole, though not for the Sharp Guard aspect of them. In the three cases of MIOs, operational control was retained by the respective national commander for forces of his respective nation. Each national commander controlled his vessels, his aircraft, his personnel, and his communications, and directed, coordinated, and controlled his forces in the conduct of the operations.[139]

There are three potential types of operational command and control of multinational forces: (1) authorization by the U.N. or regional organization (i.e., an *ad hoc* command and control structure based on U.N. or regional

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[138] U.S. DEPT. OF DEF., JOINT OPERATIONS, Joint Publication 3-0 (1993) at A-3.

[139] Not every nation controlled its forces at all times. For example, the Islamic/Arabic nations ceded control of their respective forces to Saudi Arabia during Desert Storm.

authorization of the MIOs, but which does not specifically address command and control); (2) designation by the U.N. or a regional organization of command by a single nation or regional organization; and, (3) U.N. or regional command by a designated or rotational force commander.[140] In practice, where either of the first two is used, the choice of a force commander usually will result from a "preponderance of force" rule.[141] In other words, "the state with the largest committed force provides the operational planning framework."[142] In the third method, the U.N. or regional organization provides the operational planning framework.

The three MIOs under examination all used the authorized command and control structure. In each, the U.N. authorized national, alliance, or coalition action. In none did the U.N. designate control by a particular nation, alliance, or coalition, though in the case of the FRY, NATO and the WEU took the lead and conducted operations with alliance forces only. As a result, command and control in each case, except, of course, the Sharp Guard aspect of the Adriatic operations, was an *ad hoc* arrangement. In such a situation, there are three options for the structure of command and control: parallel command, lead nation command, and a combination of the two.[143]

"Parallel command" is explained as follows:

> Parallel command exists when nations retain control of their deployed forces. If a nation within the coalition elects to exercise autonomous control of its force, a parallel command structure exists. Such structures can be organized with . . . [n]ations aligned in a common effort, each retaining national control.[144]

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[140] **Sands, *supra* note 10, at 34.**

[141] ***Id.* at 34.**

[142] ***Id.***

[143] **U.S. DEPT OF DEFENSE JOINT OPERATIONS, *supra* note 138, at VI-9.**

[144] *Id.* at VI-9. Joint Publication 3-0 seems to be mistaken when it adds, at VI-9, the following additional possibility:

> b. Nations aligned in a common effort, some retaining national control, with others permitting control by a central authority or another member force.

This would dictate a structure representing the combination structure. *Id.* at VI-11.

The command and control structure of the U.S. and British forces in Desert Storm exemplifies the parallel command structure.

Because of the *ad hoc* nature of coalitions, they often include forces of nations that are unaccustomed to working with one another. As a result, command and control within coalitions can be very difficult and complex, both politically and militarily. Simplicity is desired in coalition command and control structure, and parallel structure "is the simplest to establish and often the organization of choice."[145] The rationale for this is as follows:

> Coalition forces control operations through existing national chains of command. Coalition decisions are made through a coordinated effort of the political and senior military leadership of member nations and forces.[146]

The parallel command structure permitted national command of British forces on the operational level, but U.S. command and control of those forces on the tactical level.[147]

This command and control structure lacks commonality of communication, rules of engagement, and doctrine causing potential problems in execution of the operation. For example, the vessels of one nation may not be permitted to use warning shots against a recalcitrant vessel because its national rules of engagement are too restrictive. Under a centralized command and control structure, the commander would be permitted to put out common

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[145] *Id.* at VI-9.

[146] *Id.* Note that "[a]n alliance is a result of formal agreements between two or more nations for broad, long-term objectives," while "[a] coalition is an ad hoc arrangement between two or more nations for common action." *Id.* at VI-1.

[147] *See* U.S. DEPT OF DEFENSE JOINT OPERATIONS, II-2 to II-3:

c. THE OPERATIONAL LEVEL

. . . The operational level links the tactical employment of forces to strategic objectives. The focus at this level is on operational art--the use of military forces to achieve strategic goals.

d. THE TACTICAL LEVEL

. . . Tactics is the employment of units in combat. It includes the ordered arrangement and maneuver of units in relation to each other and/or to the enemy in order to use their full potential.

rules of engagement for all forces within the coalition, so that all involved know what to expect in certain circumstances. Nations are reluctant to give up operational control of their forces because they want control of their ROE.

The second command and control structure that is possible where action has been authorized but centralized command not designated, is "lead nation command", described as follows:

> [T]he nation providing the preponderance of forces and resources typically provides the commander of the coalition force. The lead nation can retain its organic C2 [command and control] structure, employing other national forces as subordinate formations. More commonly, the lead nation command is characterized by some integration of staffs . . . determined by the coalition leadership.[148]

Under this arrangement, operational and tactical command and control is ceded to a centralized command structure. At first glance, lead nation command seems to be the ideal command and control structure. Unfortunately, it is unrealistic, particularly where the operation is authorized and *ad hoc*, as opposed to designated. For instance, given historical reality, it is unlikely that Argentina will cede command and control of its forces to the British, or that France will cede command and control of its forces to the United States.[149] Therefore, it is unlikely that the lead nation command and control structure will be prevalent in MIOs, though it may be part of a combination command and control structure.

The combination command and control structure is a combination of parallel and lead nation command and control structures. Under this structure,

> [l]ead nation and parallel structures can exist simultaneously within a coalition. This combination occurs when two or

[148] *Id.* at VI-11.

[149] Reluctance to relinquish command and control is normally the result of internal political pressures. Note that the Argentine naval forces in the Persian Gulf Crisis came under the tactical control of the Canadian task group commander. *See* Commander Juan Carlos Neves, Argentine Navy, *Interoperability in Multinational Coalitions: Lessons from the Persian Gulf War*, 48 NAV. WAR COLL. REV. 58 (1995).

> more nations serve as controlling elements for a mix of international forces.[150]

Use of the combined structure is likely in future MIOs. Some nations will prefer to place their forces under the command and control of another nation since their forces would be ineffective without such a structure. For example, where a nation desires to comply with a U.N. request for assistance, but has a small navy and can send only one or two vessels, those vessels would be of little use except within some larger command and control structure. On the other hand, within the same operation, some nations may choose to retain national command and control. In this case, the combined structure is the likely result. All three MIOs have been conducted under the combined structure.

The combined structure is the likely future of large scale MIOs since a variety of nations will participate and some will relinquish command and control while others will not. Where a longstanding alliance, such as NATO, takes action it can enjoy command and control of alliance forces while, at the same time, national forces participate in the MIOs. This is the case of Sharp Guard and its fellow national operations in the Adriatic.

The Sharp Guard part of the Adriatic MIOs stands out as an example of an effective centralized command and control structure.(See Figure V-I) Operational command of all NATO/WEU operations in the Adriatic is maintained by Commander-in-Chief, Allied Forces Southern Europe.[151] All WEU and NATO vessels involved make up Combined Task Force 440 (CTF 440), commanded by NATO Commander, Allied Naval Forces, Southern Europe (COMNAVSOUTH) as Commander, Combined Task Force 440 (CCTF 440).[152] Under CCTF 440 are Commander, Task Group 440.01, 440.02, and 440.03, which positions are filled by Commander, Standing Naval Forces, Atlantic (COMSTANAVFORLANT), Commander, Standing Naval Forces, Mediterranean (COMSTANAVFORMED), and Commander, Western European Union Contingency Maritime Force (COMWEUCONMARFOR), on a rotational basis.[153]

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[150] U.S. DEPT OF DEFENSE JOINT OPERATIONS at VI-11.

[151] Hiscock, *supra* note 122, at 224.

[152] *Id.*

[153] *Id.*

Most significantly, CCTF 440 has operational control of all of Sharp Guard. This enables him to ensure common policy on the whole range of critical aspects, including rules of engagement, doctrine, communications, even public affairs management. Moreover, because the alliance navies making up the MIOs have trained together for many years, and because they have shared doctrine, publications, and expertise, this operation was, and is, very well executed. Captain Hiscock concludes his article:

> [Operation Sharp Guard] is sophisticated, well established, well understood and professionally executed. Well-loved NATO procedures and training have been very effective in preparing ships for operations, even though there is very little NATO doctrine for carrying out embargo operations. That ships join and leave the force, operate, communicate, fuel and run ashore together, all in the same language and under common command, should tell us that little is wrong with the execution.[154]

The advantages of centralized command and control ensure a safer, more efficient, and more effective operation. Where alliances as long-standing and close as NATO exist, MIOs can enjoy this sort of smooth conduct. Unfortunately, most situations will not allow for this, as most situations result in a multilateral response without alliance control. Even the Adriatic MIOs suffer from this defect in that national navies concurrently operate in sanction enforcement using national command and control, rules of engagement, communications, intelligence, and doctrine.

Ad hoc coalition operations are much more likely in the future than alliance operations. This creates the issue of how multilateral operations will work around the problems of command and control and consequent problems with other key aspects of MIO's.

[154] *Id.* at 226.

FIGURE V-I

SHARP GUARD--THE BEST CASE

Command & Control	Centralized
ROE	Common
Doctrine/Pubs	Common
Communications	Centralized and compatible
Language	Common
Intelligence	Shared w/o compromise of national assets
Logistics	Centralized and compatible
Public Relations	Centralized

VI. OVERCOMING THE PROBLEMS

Even where an assembly of nations recognizes a need to work together toward a common goal, only effective leadership among those nations will allow them to actually achieve the goal. As the President of the Naval War College, Rear Admiral Joseph C. Strasser, USN, recently wrote:

> In a world in which societies are becoming ever more interdependent but in which political power remains fragmented, whatever security or civility prevails may well depend on the character, the policies, the strength, and the will of a few great states, and the leadership for those states must come from this country.[155]

[155] RADM Joseph C. Strasser, USN, *President's Notes*, 47 NAV. WAR COLL. REV. 7 (1994).

The United States should view the problems of past MIOs as an opportunity to shape future MIOs. If multinational MIOs are going to be a part of our future, then it makes sense to enhance their effectiveness.

A. *Command and Control*

The most critical problem to be circumvented is command and control. It is impossible to work around the formal structure of command and control, but it is possible, even necessary, to coordinate within the structure to conduct effective operations.

In the Persian Gulf Conflict, the coalition command and control structure was of a combination nature. That is, it utilized a parallel structure for the United States and United Kingdom, and a lead nation structure for the Arab/Islamic nations. Given this structure, there were problems with the critical aspects of the operations. Problems were addressed by focusing on the ideal of unity of effort, centralization of planning, and decentralization of execution. Within a coalition operating under a combination command and control structure, this ideal may be met through the use of a Coalition Coordination, Communications, and Integration Center (C3IC), as it was known in the Persian Gulf Crisis. There, the C3IC was:

> specifically established to facilitate exchange of intelligence and operational information, ensure coordination of operations among coalition forces, and provide a forum where routine issues could be resolved informally and collegially among staff officers.[156]

This device enabled the coalition to achieve a strong sense of unity of effort in spite of the nature of its command and control structure:

> The C3IC became a clearinghouse for coordination of training areas, firing ranges, logistics, frequency management, and intelligence sharing. Manned by officers from all Coalition forces, the C3IC served as the primary tool for coordination of the myriad details inherent in combined military operations. . . . The C3IC became a vital tool in ensuring unity of effort

[156] U.S. DEPT OF DEFENSE JOINT OPERATIONS at VI-9.

> among Coalition forces, remaining in operation throughout Operations Desert Shield and Desert Storm.[157]

The C3IC was a critical factor in the success of Desert Shield and Desert Storm. The C3IC allowed the coalition members to cooperate to the extent necessary for effective operations without a centralized command and control structure enabling the Coalition to achieve unity of effort.

In similar operations even less formal coordination may be used. For instance, during the Gulf Crisis, coalition members often met informally to discuss rules of engagement. One instance was described at the Twelfth International Seapower Symposium in November 1993, by Admiral Henry H. Mauz, Jr., USN, then Commander-in-Chief, U.S. Atlantic Fleet:

> [T]he issue of developing a maritime command and control arrangement was done on an *ad hoc* basis. It was done on the basis of individual countries' instructions, what their capitals allowed them to do and on their individual rules of engagement. We had a meeting in Bahrain . . . and we discussed our individual rules of engagement and what our capitals would allow us to do.[158]

Representatives from Coalition member nations gathered informally on a frequent basis to clarify the pressing issues of the day. These informal meetings proved to be invaluable to the success of coordinated efforts in the Gulf Crisis.

Another important measure for achieving coalition coordination within a command and control structure is the use of liaison officers among the participating navies. A combined operation dictates that the commander of the operation will enjoy staff members from the coalition partner nations. Liaison officers may be utilized more extensively among the participants to ensure some commonality. While both formal and informal coordination can ease the difficulties of a decentralized command and control structure, it will not completely overcome these command and control issues.

In preparing for future MIOs, nations should strive to work out these command and control issues in advance. Within alliances, NATO and OAS, for

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[157] GULF WAR, FINAL REPORT, *supra* note 58, at 44.

[158] Remarks of ADM Henry H. Mauz, Jr, USN, at the Naval War College Twelfth Seapower Symposium in TWELFTH SEAPOWER SYMPOSIUM REPORT(1993), *supra* note 8, at 70.

example, U.S. and alliance units can identify likely future MIOs and work command and control aspects of a future operation as part of a larger exercise. Moreover, the political groundwork should be laid now for future command and control structure.

B. *Rules of Engagement*[159]

One of the primary problems of any multinational operation is the issue of rules of engagement. Misunderstanding about the rules of engagement for any operation can lead to disaster, even the failure of the operation to avoid escalation or the failure of the coalition to stay together. A scenario similar to the Iranian Airbus incident or USS STARK incident, only involving friendly MIOs forces,[160] is possible. It is critical, therefore, that rules of engagement be at least widely and openly shared, if not made common, although notions of sovereignty may prevent such cooperation.

Rules of engagement(ROE) are "[d]irectives that a government may establish to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces."[161] ROE are closely tied to the two tenets of international law mentioned earlier: necessity and proportionality. ROE must fit within these two tenets. Current U.S. policy states that:

> In defending against a hostile act or hostile intent under these SROE [i.e., Standing Rules of Engagement], unit commanders should use only that degree of force necessary to decisively

[159] The forces of the United States formerly operated under what was known as the JCS Peacetime Rules of Engagement. During the writing of this paper, the JCS Standing Rules of Engagement were distributed. Both documents are classified as a whole. However, one of the longstanding complaints about the Peacetime ROE was that key definitions were classified and could not be openly discussed. The new Standing ROE provides unclassified definitions to certain key terms.

[160] This is called "amicide." not to be confused with "fratricide," which involves an unlawful rather than an accidental act. *See* Shrader, *Amicide: The Problem of Friendly Fire in Modern War*, U.S. ARMY COMMAND AND GENERAL STAFF COLLEGE STUDIES INSTITUTE RESEARCH SURVEY NO. 1 (1982), quoted in W. Hays Parks, *Righting the Rules of Engagement*, 115 U.S. NAVAL INSTITUTE PROCEEDINGS 83-93 (May 1989).

[161] U.S. DEPT OF DEFENSE DICTIONARY, Joint Publication 1-02

> counter the hostile act or hostile intent and to ensure the continued safety of US forces.[162]

ROE must conform to these historic, yet current, principles. Current U.S. ROE are not designed to limit the inherent right of self-defense. The following language is contained throughout the SROE:

> THESE RULES DO NOT LIMIT A COMMANDER'S INHERENT AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS AVAILABLE AND TO TAKE APPROPRIATE ACTION IN SELF-DEFENSE OF THE COMMANDER'S UNIT AND OTHER US FORCES IN THE VICINITY.[163]

Thus, the commanding officer of a U.S. naval vessel or the pilot of an aircraft is not only authorized, but is required to act in self-defense. While this inherent right of self-defense in the ROE seems to make common sense, it is much more complex in practice. The ROE provide further guidance regarding "hostile act" and "hostile intent" so that the operator may know when to act in self-defense.[164]

In MIOs, the ROE issues focus on the use of force for mission accomplishment, particularly the use of warning shots and disabling fire. Even with broadly worded enabling documents, the ROE will be quite restrictive. There is no need to risk an escalatory incident during an operation designed to avoid escalation.

In Sharp Guard, the forces used NATO ROE, thereby overcoming the problems experienced by the *ad hoc* versions of MIOs. In all other MIOs, navies operated under national ROE. Even in Sharp Guard there are problems, as noted in the following remarks:

> One of the most confusing aspects of multinational ROE, demonstrated most clearly in the embargo operations against Serbia, was the presence in the Adriatic of French, U.S., and

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[162] Chairman, Joint Chiefs of Staff Instruction (CJCSI), Standing Rules of Engagement of U.S. Forces, 3121.01 of Oct. 1, 1994, Enclosure A-6 (unclassified).

[163] *Id.* at A-3.

[164] *Id.* at A-5.

> U.K. task groups operating independently under their own national ROE. They then rotated ships into the NATO and WEU task groups, which were operating under the hybrid NATO-WEU ROE. This complication blurred the distinction between when units were operating under which set of ROE, and caused confusion about the duties and responsibilities of national forces to protect and assist NATO-WEU forces, including ships of their own flag. Uniform Adriatic-wide ROE were clearly called for and desired by the task-group commanders.[165]

There is wide support, in fact, for the view that ROE in a multinational operation can cause confusion and risk incident. The problem was described at the Eleventh International Seapower Symposium, as follows:

> To train a weapon means something completely different for the Brits than it does for the United States. One country says that to train is to turn your weapon around, and other one says that to train might be to aim. So there is a lot to be done certainly in the field of a clear definition of hostile intent and hostile act.[166]

In order to work around the problem of ROE in multinational MIOs nations must focus on coordination. In the Persian Gulf MIOs, monthly meetings among the coalition participants took place aboard rotating flagships.[167] This enabled each of the participating navies to know what the others were doing with respect to ROE, even if it did not bring about commonality.

The other mechanism used in all three MIOs was to utilize the vessels of each navy to take advantage of their ROE. Utilizing this example, navies with robust ROE should enforce areas where the potential threat is higher since navies with less robust ROE could endanger their forces. Each nation benefits

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[165] Timothy Carroll et al., *Rules of Engagement in Maritime Coalitions: Final Briefing*, CAB 94-18.10, Center for Naval Analysis 22 (October 1994).

[166] Remarks of Vice Admiral van Foreest, Netherlands Navy, Coalition Maritime Operations in Naval War College EIGHTH SEAPOWER SYMPOSIUM REPORT, at 64 (1992).

[167] Dalton, *supra* note 92, at 49.

from the political legitimacy of a multinational operation and can participate in its own, best way.[168]

In Sharp Guard, the NATO and WEU forces used NATO ROE. This commonality with respect to ROE allows for predictability for the operators. While this is the ideal, it is unrealistic. Domestic political pressure within a nation can simply be insurmountable. Vice Admiral Foreest concluded his remarks at the Eleventh International Seapower Symposium, as follows: "[There] will never be, in a coalition effort, a common set of rules of engagement sponsored by the United Nations. I think it will remain a national obligation."[169] Nevertheless, few would argue against making an effort towards the creation of MIOs standing rules of engagement for multinational operations. The details of such ROE should be no secret. Given the nature and intent of MIOs as an early step in enforcement and coercion, they are intended to be peaceful whenever possible. By sharing MIOs ROE with the world, potentially escalatory incidents may be avoided. This sharing was done, in a limited way, in the FRY, when NATO released to the Serbs several notions of what NATO forces would consider to be hostile intent. Not all ROE should be shared openly because it would be unwise to allow an adversary to know what actions would be taken in every situation. Those rules that govern most of MIOs could be disclosed with little, if any, risk to the security of national and coalition forces.

MIOs have thus far been, for the most part, peaceful. In the Gulf, for instance, Iraq's navy simply did not pose a viable threat to coalition forces. In the Gulf MIOs, there were, between August 17, 1990 and 28 February 1991, only eleven warning shots fired, no use of disabling fire, only eleven takedown actions, and a mere 51 diversions of vessels.[170] Most of the warning shots were fired by U.S. vessels early in the operation, even before August 25, 1990, the effective date of U.N. Security Council Resolution 665. In the Adriatic MIOs, there were no warning shots or disabling fire used through December 28,

[168] *Id.* at 49.

[169] Remarks of VADM van Foreest, *supra* note 166.

[170] GULF WAR, FINAL REPORT, *supra* note 92, at 60.

1994.[171] The Haiti MIOs likewise saw no use of warning shots or disabling fire.[172]

NATO's experience in Sharp Guard demonstrates the advantages of common ROE. Admiral Miller remarked that:

> [T]he more difficult and more intense the political situation, the more difficult it will be to get everybody to agree to rules of engagement. But the more opportunity we have to put on the shelf successful examples for achieving rules of engagement, such as in the Adriatic and such as we did in a limited way in Haiti, the more learning we will have to draw on and build on, regardless of the intensity of future operations.[173]

It is the responsibility of the United States to work with potential alliance and coalition partners to share experience and views on ROE through combined exercises, training exchanges, and publication exchanges. No one would suggest that the United States risk any sense of national security to accomplish this. Discussion could take place at periodic conferences where, through compromise, exercise ROE are worked out, then exercises could be accomplished by message. Review of the exercises could also be conducted electronically. This is not to say that a definitive set of MIO ROE must be established; rather, shared experience and ideas will lead to an easier, smoother, faster establishment of shared or common ROE for a real life situation.

Throughout the Eleventh and Twelfth Seapower Symposia there was broad agreement to enhanced sharing of ROE. While the political reality that future operations will be *ad hoc* was widely accepted, most commentators urged commonality, or least a sharing, of ROE.

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[171] NATO Fact Sheet on Operation SHARP GUARD, AFSOUTH PUBLIC INFORMATION (Viale della Liberazione, 80124 Naples, Italy)

[172] Telephone interview with Major Karl Woods, USMC, Assistant Staff Judge Advocate, United States Atlantic Command, Norfolk, Virginia (Nov. 30, 1994).

[173] Remarks of Paul D. Miller, at Theatre Commander (November 1993), in TWELFTH SEAPOWER SYMPOSIUM REPORT, *supra* note 8, at 47.

C. *Communications*

Communications are the central nervous system of any successful military operation. Orders and ROE cannot be timely distributed, coordinated movement is difficult, and all other aspects of the operation suffer. Vice Admiral Cairns has noted:

> [C]ommunications connectivity is the single, most important element of command and control in multinational operations. . . . Without it, these operations cannot be effective because forces operating under national command, but with a high degree of cooperation, require extensive information exchange.[174]

Once again, in the WEU/NATO Sharp Guard, communications worked well because of longstanding integration of equipment, common training, common language, and common publications and doctrine.

Recognizing that the United States will likely lead most future multinational MIOs, nations who wish to participate as part of their obligations to the international community under the United Nations Charter should install the necessary equipment before the next crisis. As Commander Neves wrote:

> Neither a common cryptographic capability nor a common datalink, however, can be improvised in the process of gathering an *ad hoc* coalition, even if technical solutions are available. These require prior political agreement and technical efforts among those navies who aim to achieve efficient participation in a multinational coalition.[175]

Communications interoperability, then, is technology dependent. The only fix is compatible equipment and combined exercises of that equipment. To this end, the United States should take the lead in seeking compatibility of communications (including cryptographic) equipment within its alliances and with other navies with which it will likely operate in the future.

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[174] Remarks of Vice Admiral Peter W. Cairns, Canadian Forces, Coordination in Combined Maritime Operations, (November 1993), in TWELFTH SEAPOWER SYMPOSIUM REPORT, *supra* note 8, at 104.

[175] Neves, *supra* note 8, at 58.

VII. CONCLUSIONS

There is little, if any, doubt that MIOs are a likely part of future responses to illegitimate aggression and unlawful action. MIOs are a rapid, flexible, deterrent to aggression, and demonstrate the resolve of participating nations and, where applicable, the United Nations. Historically, MIOs derive from blockade, visit and search, pacific blockade, and quarantine, and its standards and norms reflect this derivation. Legally, MIOs are justified on one of two bases: the inherent right of forcible self-help under customary international law, or the United Nations Charter. All three MIOs thus far conducted have found their legal justification in the Charter, through Security Council resolutions.

The analysis of the three cases reveals operations that are multilateral in name, but national in practice. This has made for difficulty in interoperability, and has reduced the safety, effectiveness, and efficiency of the operations. Analyzing key aspects of any such operation, including command and control, rules of engagement, and communications, indicates that there is room for significant improvement to enhance the interoperability and mission accomplishment of future MIOs.

Recommendations for improvement rest on the view that the United States should take the lead in bringing alliance and other friendly nations into more effective interoperability through frequent conferences, training, and exercises. There is no reason why certain useful publications could not be distributed to future MIOs partners to bring about a consensus on MIOs in much the same manner as NWP 9 was distributed to bring about a consensus on the international law of naval operations.

The three key aspects of MIOs analyzed here, command and control, rules of engagement, and communications, must be improved upon for future MIOs. Were the next MIOs to confront a viable naval threat, the *ad hoc* approach of the past could lead to failure. These operations are designed to coerce a target state while avoiding escalation. Misunderstanding in any of the key areas could lead to either a break-up of the coalition or the undesired escalation.

The problems experienced in past MIOs have not prevented success. This fact is attributable to the efforts of the navies involved to work around the problems. Workarounds, however, may not be practicable in the future if the MIOs are "hotter" than they have been in the past.

The problems discussed actually present an opportunity for the United States to lead its friends into a U.S.-friendly MIOs regime. The more effective U.S. preparation for the next MIOs, the better the MIOs result, and the more likely that a MIOs regime accepted by the world community will reflect U.S. interests.

OVERHAULING THE VESSEL EXCEPTION

Major Dwight H. Sullivan[*]

I. INTRODUCTION

The Uniform Code of Military Justice (UCMJ) was designed "to provide for uniformity in the administration of military justice."[1] Yet the UCMJ has created two classes of servicemembers. Unlike their shore-based counterparts, servicemembers attached to or embarked in a vessel have no right to refuse nonjudicial punishment.[2] As a result, they can be punished based on

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[1] Letter from Secretary of Defense James Forrestal to the Speaker of the House of Representatives (Feb. 8, 1949), *reprinted in* H.R. REP. NO. 491, 81st Cong., 1st Sess. 39 (1949) [hereinafter HOUSE REPORT].

[2] UCMJ art. 15(a), 10 U.S.C. § 815(a) (1994). Article 15(a) provides, in part, "[E]xcept in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment." *Id.* The portion of Article 15 that deprives servicemembers "attached to or embarked in a vessel" of the right to refuse nonjudicial punishment is commonly known as the "vessel exception." Phyllis W. Jordan, *Navy justice: a conflict of interest?*, VIRGINIAN-PILOT, Sept. 22, 1991, at A1, A8.

The Navy Court of Military Review rejected equal protection challenges to the vessel exception in *United States v. Nordstrom*, 5 M.J. 528 (N.C.M.R. 1978), *United States v. Lecolst*, 4 M.J. 800 (N.C.M.R. 1978), and *United States v. Penn*, 4 M.J. 879 (N.C.M.R. 1978). For a discussion of *Penn*, see *infra* notes 83-87 and accompanying text. *But see* Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet, 18 M.J. 198, 203 (C.M.A. 1984) (Everett, C.J., dissenting) (maintaining that the vessel exception can create an equal protection violation) (for a discussion of *Jones*, see *infra*

unconstitutionally-obtained evidence.[3] They can be punished without any opportunity to confront their accusers.[4] They can be punished without receiving

notes 106-09 and accompanying text).

Unlike shore-based personnel, enlisted servicemembers attached to or embarked in vessels are also subject to three days' confinement on bread and water or diminished rations as a nonjudicial punishment. UCMJ art. 15(a)(2)(A). However, service regulations exempt Coast Guard and Air Force personnel from confinement on bread and water or diminished rations. COMDINST M5810.1c, MILITARY JUSTICE MANUAL, para. 1-E-3e (15 Jan 1991) [hereinafter COAST GUARD MILITARY JUSTICE MANUAL]; DEP'T OF AIR FORCE, AIR FORCE INSTR. 51-202, NONJUDICIAL PUNISHMENT GUIDE, Table 2, n.3 (14 April 1994) [hereinafter AIR FORCE NONJUDICIAL PUNISHMENT GUIDE].

[3] *See, e.g.*, Dobzynski v. Green, 16 M.J. 84 (C.M.A. 1983). Dobzynski, a crewmember aboard a guided missile cruiser, was tried by a special court-martial for possession of marijuana. The military judge concluded that the marijuana had been discovered unconstitutionally and suppressed it. The convening authority withdrew the charges and imposed nonjudicial punishment for possession of the same marijuana that had been the subject of the successful suppression motion. *Id.* at 85. The Court of Military Appeals concluded that "the charges were properly withdrawn from the special court-martial and . . . the Article 15 punishment was properly imposed." *Id.* at 86. Nevertheless, the court cautioned that "the disposition of the offenses in this case lends itself, at the very least, to the impression of injustice—a perception to be avoided in a fundamentally fair justice system." *Id.* at 85. *But see id.* at 87 n.5 (Everett, C.J., dissenting) (suggesting that the Fourth and Fifth Amendments may require exclusion of unconstitutionally-obtained evidence at a nonjudicial punishment hearing if the servicemember had no right to refuse nonjudicial punishment). *See also* Dumas v. United States, 620 F.2d 247, 253-54 (Ct. Cl. 1980) (noting that while "the right against unreasonable searches and seizures is not limited to 'criminal prosecutions,'" military necessity concerns and the noncriminal nature of nonjudicial punishment "clearly weigh against full application of the exclusionary rule to Article 15 proceedings"); Varn v. United States, 13 Cl. Ct. 391, 396 (1987) (suggesting that statements obtained in violation of a servicemember's Fifth Amendment rights can be considered at nonjudicial punishment proceedings).

For other examples of abuses of nonjudicial punishment, see 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 8-21.20 (1991), and William R. Salisbury, Comment, *Nonjudicial Punishment under Article 15 of the Uniform Code of Military Justice: Congressional Precept and Military Practice*, 19 SAN DIEGO L. REV. 839, 850-55 (1982).

[4] The Manual for Courts-Martial provides that before nonjudicial punishment may be imposed, "the servicemember shall be entitled to . . . [h]ave present witnesses, including those adverse to the servicemember, upon request if their statements will be relevant and they are reasonably available." MANUAL FOR COURTS-MARTIAL, United States, pt. V, ¶4c(1) (1995 edition) [hereinafter 1995 MCM]. However, "a witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties." *Id. See also* Wales v. United States, 14 Cl. Ct. 580, 587 (1988) (noting that because nonjudicial punishment is "noncriminal in nature[,] . . . the rights afforded by the fifth and sixth amendments of the Constitution to due process, confrontation, and assistance of counsel do not attach.").

a right to legal representation.[5] And they can be punished without having their guilt or innocence decided by a panel of disinterested members.[6]

A recent incident demonstrates the abuses that can arise from the nonjudicial punishment refusal right's vessel exception. In *Fletcher v. Covington*,[7] a Navy chief petty officer assigned to a guided missile cruiser was tried by special court-martial for cocaine use. Chief Fletcher moved to compel discovery of an investigation into employee misconduct at the Navy drug screening laboratory that tested his sample.[8] After conducting an *in camera* review, the military judge ordered the government to disclose the investigation to the defense or abate the prosecution. Instead of producing the report, the convening authority dismissed the charges and notified Chief Fletcher that he would face a nonjudicial punishment hearing. The vast majority of servicemembers could have refused nonjudicial punishment, thus defeating the command's attempt to evade the military judge's ruling. Chief Fletcher, however, was assigned to a vessel. Even though the ship remained pier-side throughout this episode, Article 15(a) left Chief Fletcher susceptible to command abuses that could not have been inflicted on a shore-based servicemember.[9]

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[5] *See generally* Middendorf v. Henry, 425 U.S. 25 (1976) (indicating that because nonjudicial punishment is not a criminal forum, no right to counsel attaches). The Manual for Courts-Martial grants a servicemember the right to be accompanied by a "spokesperson" at the nonjudicial punishment proceeding, but that spokesperson need not be a lawyer, and the spokesperson "may not question witnesses except as the nonjudicial punishment authority may allow as a matter of discretion." 1995 MCM, *supra* note 4, pt. V, ¶4c(1)(B).

[6] *See* 1995 MCM, *supra* note 4, pt. V, ¶2 (providing that only commanders or, if authorized by the relevant Service Secretary, principal assistants of officers exercising general court-martial jurisdiction, may impose nonjudicial punishment); *see also* MANUAL OF THE JUDGE ADVOCATE GENERAL 0106 (1990) [hereinafter JAGMAN] (authorizing officers-in-charge and, with the prior approval of the Chief of Naval Personnel or the Commandant of the Marine Corps, principal assistants of officers exercising general court-martial jurisdiction, to impose nonjudicial punishment).

[7] 42 M.J. 215 (1995) (order); 42 M.J. 116 (1995) (summary disposition).

[8] The facts of the case are set out at 42 M.J. at 116-17 (Sullivan, C.J., dissenting), and Brief for Petitioner at 2-6, Fletcher v. Covington, 42 M.J. 116 (1995) (summary disposition) (No. 95-8014/NA).

[9] The Court of Appeals for the Armed Forces ordered a stay of Chief Fletcher's nonjudicial punishment proceeding pending resolution of his petition for extraordinary relief. Fletcher v. Covington, 42 M.J. 215 (1995) (order). After the government provided a copy of the investigation to Chief Fletcher, he successfully moved to dismiss his petition. Fletcher v. Covington, 42 M.J. 116 (1995) (summary disposition).

For much of the UCMJ's history, the vessel exception was an anomaly of the seagoing services.[10] In this era of joint operations, however, servicemembers from all of the armed forces may find their rights limited by embarkation aboard a naval vessel.[11] In 1994, for example, two aircraft carriers transported 4,000 Army troops to the Caribbean for service in Operation Restore Democracy.[12] The vessel exception deprived these 4,000 soldiers—as

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[10] *See infra* notes 29-31 and accompanying text. The Navy's history of nonjudicial punishment differs markedly from the Army's:

> Article I of the "Rules for the Regulation of the Navy of the United States," adopted by the Continental Congress in 1775, required Navy commanders to "discountenance and suppress all dissolute, immoral, and disorderly practices; and also, such as are contrary to the rules of discipline and obedience, and to correct those who are guilty of the same according to the usage of the sea." Originally, there were no specific limitations on the authority of the commander of a ship. By custom and usage, he was permitted to imprison, and also inflict reasonable corporal punishment upon a seaman, for disobedience to reasonable commands, or for disorderly, riotous, or insolent conduct. Later, by regulation and by statute, limitations were placed on the punishment that could be imposed by naval commanders at "captain's mast" proceedings.
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> In the Army, nonjudicial punishment as it is presently known, was first authorized by the Articles of War of 1916, although prior to that time a "summary court," consisting of "the line officer second in rank at the post or station" was authorized to hear and determine a case and impose punishment on enlisted men consisting of a fine of not more than 1 month's pay, or imprisonment for not more than 1 month. This putative power, first authorized by the Army in 1890, was later increased by the Congress to authorize not more than 3 months' fine, imprisonment, or hard labor. By the 1916 Articles of War, under the heading of "Disciplinary Powers of a Commanding Officer," article 104 authorized commanding officers to impose punishment consisting of admonition, reprimand, withholding of privileges, extra fatigue, and restriction upon members of their commands. Subsequent amendments to the Articles of War carried forward this authority and added authority to forfeit a part of the pay of an officer.
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> The Articles of War were made applicable to the Air Force when it became a separate armed force in 1947.

S. REP. NO. 1911, 87th Cong, 2d Sess. 3 (1962) [hereinafter SENATE NJP REPORT] (internal citations and quotation marks omitted). For a more detailed review of the history of nonjudicial punishment, see Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 38-46 (1965).

[11] *But see infra* note 14 for a discussion of Air Force policy regarding the right to refuse nonjudicial punishment. In addition to the possibility of embarkation on naval vessels, some Army personnel fall under the vessel exception because they are attached to or embarked in vessels operated by the Army Transportation Corps and Corps of Engineers. 1 GILLIGAN & LEDERER, *supra* note 3, at § 8-26.12.

[12] *See generally* Dale Eisman, *Haiti Proves that Cooperation Is Crucial to Military, Miller Says*, VIRGINIAN-PILOT, Oct. 21, 1994, at A13; David C. Morrison, *Firefight*, 26 NAT'L J. 2274 (1994) (discussing Operation Restore Democracy).

well as more than 6,000 crewmembers aboard the two ships[13]—of the right to refuse nonjudicial punishment.[14]

This article explores the history of the UCMJ's vessel exception and the history of the related Manual for Courts-Martial provision. This examination includes a review of congressional and Executive Branch materials that help to discover the vessel exception's original meaning. The article then analyzes the case law concerning the vessel exception and compares that case law to the original understanding of the vessel exception's proper scope. The article concludes with a proposal to limit the vessel exception's scope, thus reducing the number of servicemembers who do not enjoy the UCMJ's full protection.

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[13] The two aircraft carriers involved were the USS DWIGHT D. EISENHOWER (CVN 69) and the USS AMERICA (CV 66). Morrison, *supra* note 12, at 2274. Excluding the ships' air wings, the EISENHOWER had 170 officers and 3,039 enlisted crewmembers; the AMERICA had 143 officers and 2,910 enlisted crewmembers. NORMAN POLMAR, THE NAVAL INSTITUTE GUIDE TO SHIPS AND AIRCRAFT OF THE U.S. FLEET 70, 86 (15th ed. 1993).

[14] UCMJ art. 15(a). The Manual for Courts-Martial provides that the right to refuse nonjudicial punishment "may also be granted to a person attached to or embarked in a vessel if so authorized by regulations of the Secretary concerned." 1995 MCM, *supra* note 4, pt. V, ¶3. The Army applies the vessel exception to its soldiers. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 3-17*d* (8 Aug. 1994) ("Soldiers attached to or embarked in a vessel may not demand trial by court-martial in lieu of nonjudicial punishment."). *See also* JAGMAN, *supra* note 6, at 0108c ("A person in the Navy or Marine Corps who is attached to or embarked in a vessel does not have the right to demand trial by court-martial in lieu of nonjudicial punishment."); COAST GUARD MILITARY JUSTICE MANUAL, *supra* note 2, at para. 1-D-1(3)(a) ("A person who is attached or embarked in a vessel does not have the right to refuse nonjudicial punishment."). The Air Force's nonjudicial punishment regulation does not directly address the vessel exception. However, the regulation does provide that "[w]hen the alleged offender demands trial by court-martial, the commander may not impose punishment under Article 15." AIR FORCE NONJUDICIAL PUNISHMENT GUIDE, *supra* note 2, at para. 6.1. This provision may have the effect of overruling the vessel exception *sub silentio*.

II. THE VESSEL EXCEPTION'S LEGISLATIVE HISTORY

A. The UCMJ's Original Treatment of Nonjudicial Punishment Refusal Rights

Before the UCMJ's adoption, Army personnel could refuse "company punishment," the equivalent of nonjudicial punishment.[15] Department of the Navy personnel, however, had no right to refuse captain's mast.[16] As originally proposed, the UCMJ allowed each of the service secretaries to determine whether a servicemember could refuse nonjudicial punishment.[17] During the House hearings on the proposed UCMJ, the Defense Department's Assistant General Counsel testified that the Army intended to allow its personnel to refuse nonjudicial punishment, while the Department of the Navy intended to deny its personnel the right to refuse.[18] Despite several witnesses' arguments that all servicemembers should have the right to refuse nonjudicial

[15] *Hearings Before a Subcomm. of the Comm. on Armed Services, House of Representatives, on H.R. 2498,* 81st Cong., 1st Sess. 933 (1949) [hereinafter *House Hearings*] (statement of Felix Larkin, Assistant General Counsel of the Office of the Secretary of Defense).

[16] *Id.* at 933. "Captain's mast" and "mast" are the Navy's traditional terms for nonjudicial punishment. The terms "arose from the fact that, in the days of sail, the commanding officer of a ship would address his crew on the main deck, near the mainmast, which was usually the widest part of the deck. There, important announcements would be made, commendations awarded, and punishments imposed and executed." EDWARD M. BYRNE, MILITARY LAW 194 (3d ed. 1981). The terms remain in use today, even though "[m]ast is no longer held before the mainmast. It is now held in a space within the ship large enough to accommodate the necessary number of accused persons, witnesses, and others involved." *Id.* In the Coast Guard, nonjudicial punishment is also referred to as "captain's mast," in the Marine Corps it is known as "office hours," and in the Army and Air Force it is called "Article 15." DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE § 3-1 (3d ed. 1992).

[17] H.R. 2498, 81st Cong., 1st Sess. art. 15(b) (1949), *reprinted in House Hearings*, *supra* note 15, at 570.

[18] *House Hearings*, *supra* note 15, at 933 (statement of Mr. Larkin).

punishment,[19] the House of Representatives adopted the nonjudicial punishment refusal right provision as originally drafted.[20]

The Senate's UCMJ hearings also featured arguments advocating that Congress expand the refusal right to cover all servicemembers.[21] But just as its House counterpart had done, the Senate Armed Services Committee rejected these arguments and recommended allowing each service to determine its members' nonjudicial punishment refusal rights.[22] During the Senate's floor

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[19] *Id.* at 649 (statement of Arthur E. Farmer, Chairman of the War Veterans Bar Association's Committee on Military Law); *id.* at 734, 736 (statement of Paul C. Wolman, Chairman of the Veterans of Foreign Wars' National Security Committee); *id.* at 753 (statement of Colonel John P. Oliver, Legislative Counsel of the Reserve Officers Association, arguing "that no nonjudicial punishment should be imposed without the alternative right to trial by court martial and that such alternative right should be granted by legislation rather than by the grace of the head of a department or other subordinate officer."); *id.* at 818-19 (statement of Robert D. L'Heureux, Chief Counsel of the Senate Banking and Currency Committee).

[20] 95 CONG. REC. 5744 (1949). The House Armed Services Committee explained:

> [E]mpower[ing] the Secretary of the Department to permit members of the armed forces to elect trial by court martial in lieu of [nonjudicial punishment] . . . recognizes a difference in present practice among the armed forces. The Navy allows no election on the theory that the commanding officer's punishment relates entirely to discipline, not crime; furthermore, in the Navy the officer who has summary court-martial jurisdiction is the same officer who imposes punishment under this article, or his subordinate. Therefore, to grant an option to naval personnel would be meaningless where the commanding officer was also the summary court officer. In the event the commanding officer were not the summary court officer, it would result in granting a subordinate officer the authority to pass judgment upon his superior. This is not a desirable situation and has resulted in the revision of this subdivision which will permit the Secretary of the Navy to handle this situation by appropriate regulations. In the Army, on the other hand, a company commander with power under this article will not usually have summary court-martial jurisdiction. Almost without exception a summary court officer in the Army or Air Force will be superior in rank to the officer who adjudges disciplinary punishment.

HOUSE REPORT, *supra* note 1, at 14-15. As originally adopted, the UCMJ did not allow a servicemember to refuse to be tried by summary court-martial if the servicemember had already refused nonjudicial punishment. Uniform Code of Military Justice, Pub. L. No. 506, 64 Stat. 108, art. 20 (codified as amended at 10 U.S.C. § 820 (1994)); *see also* HOUSE REPORT, *supra* note 1, at 17.

[21] *Hearings Before a Subcomm. of the Comm. on Armed Services, United States Senate, on S. 857 and H.R. 4080,* 81st Cong., 1st Sess. 91 (1949) [hereinafter *Senate Hearings*] (statement of Arthur E. Farmer, Chairman of the War Veterans Bar Association's Committee on Military Law); letter from Mr. Farmer to Senator Estes Kefauver (D-Tenn.) (May 6, 1949) (maintaining that while the Navy did not provide its members a right to refuse mast, "historical precedent should not furnish an excuse for the continuation of injustice."), *reprinted in Senate Hearings*, *supra*, at 297.

[22] S. REP. NO. 486, 81st Cong., 1st Sess. 11 (1949).

debate on the UCMJ, Senator Charles Tobey (R-N.H.), offered an amendment that would have allowed all servicemembers to refuse nonjudicial punishment.[23] The Senate, however, never voted on Senator Tobey's amendment.[24] Following an unsuccessful attempt to refer the proposed UCMJ to the Senate Judiciary Committee, opposition to the legislation virtually collapsed[25] and the Senate approved the UCMJ by a vote of sixty-two to nine.[26] On May 6, 1950, President Truman signed the UCMJ into law.[27]

In February 1951, President Truman issued the first Manual for Courts-Martial under the UCMJ.[28] Paragraph 132 of the 1951 Manual set out the services' nonjudicial punishment refusal regulations. These regulations authorized Army and Air Force personnel to demand "trial by court-martial in lieu of" nonjudicial punishment.[29] On the other hand, "[n]o member of the

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[23] 95 CONG. REC. 1297 (1950) (Amendment E). This was one of 25 amendments Senator Tobey proposed. *Id.* at 1293-1310. Senator Tobey commented that "the feature I object to most" in the proposed UCMJ "is the denial of the right to demand trial unless the Secretary by regulation" grants such a right. *Id.* at 1297 (Amendment E Explanation). Senator Tobey referred to "the unfairness inherent in arbitrary punishment without the right to a day in court." *Id.* He expressed concern that, because the legislation entrusted the nonjudicial punishment refusal right to departmental regulations, some future Secretary of the Army might deprive soldiers of the right. *Id.* Senator Tobey also argued, "I am reminded of the opposition of many naval officers to the abolition of flogging 99 years ago. Somehow the Navy survived." *Id.* For an account of the abolition of flogging in the Navy, see Leo F. S. Horan, *Flogging in the United States Navy*, 76 U.S. NAVAL INST. PROC. 969 (1950).

[24] 1 JONATHAN LURIE, ARMING MILITARY JUSTICE 249, 253 (1992).

[25] *See generally id.* at 245-54.

[26] 96 CONG. REC. 1446 (1950). Senator Tobey cast one of the nine nays. *Id.* This vote occurred on February 3, 1950. On April 25, 1950, the Senate adopted the conference report resolving differences between the House and Senate versions of the bill. *Id.* at 5681. The following day, the House adopted the conference report. *Id.* at 5796.

[27] *Id.* at 6640. Upon signing the UCMJ, President Truman issued a statement praising the legislation for promoting "unification in the Armed Forces." Statement by the President Upon Signing Bill Establishing a Uniform Code of Military Justice, 1950 PUB. PAPERS 108 (May 6, 1950).

[28] MANUAL FOR COURTS-MARTIAL, United States ix (1951).

[29] *Id.* at ¶132.

Navy or the Coast Guard" could "demand trial by court-martial in lieu of punishment under the provisions of Article 15."[30]

B. *Congressional Consideration of a Broader Nonjudicial Punishment Refusal Right*

By 1962, widespread dissatisfaction had arisen over the UCMJ's original maximum limits on nonjudicial punishment.[31] Representative Carl Vinson (D-Ga.), the chairman of the House Armed Services Committee, responded to these concerns by introducing legislation to increase permissible punishments.[32] During the House hearings on this proposal, the issue of nonjudicial punishment refusal rights arose several times.[33] Representative

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[30] *Id.* Paragraph 132 of the 1951 Manual indicated that these provisions were "departmental regulations . . . announced by the several Secretaries." *Id.* Thus, the reference to "[n]o member of the Navy" apparently extended to the Marine Corps as well.

[31] Organizations recommending an increase in the maximum authorized punishments included the Department of Defense, the Court of Military Appeals, the American Legion, the Association of the Bar of the City of New York, the New York County Lawyers Association, the American Veterans' Committee, the Judge Advocates Association, and the American Bar Association. *Subcommittee No. 1 Consideration of H.R. 7656, to Amend Section 815 (Article 15) of Title 10, United States Code, Relating to Nonjudicial Punishment, and for other Purposes*, 87th Cong., 1st Sess. 4899, 4943-44 (1962) [hereinafter *House NJP Hearings*]. Many of those supporting increased nonjudicial punishments argued that servicemembers would be better off because some cases that would otherwise be tried by summary court-martial would instead be resolved at nonjudicial punishment. *Id.* Statistics suggest that such a diversion of cases from summary court-martial to nonjudicial punishment did occur in the wake of the legislation's adoption. WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 150-512 (1973).

[32] H.R. 7656, 87th Cong., 1st Sess. (1962), *reprinted in House NJP Hearings, supra* note 31, at 4897-98 [hereinafter H.R. 7656]. Specifically, the bill authorized forfeiture of one-half of one month's pay per month for two months, and correctional custody for not more than 30 days. *Id.* The House referred the bill to the Armed Services Committee. 107 CONG. REC. 10431 (1961).

[33] Representative L. Mendel Rivers (D-S.C.), the chairman of the subcommittee that held hearings on the bill, stated that members of "the Air Force and the Army can demand a court-martial, but not so with the Navy. . . . Because in the Navy it is a different proposition. The law of the sea is different from the law of the other things. This is ageless and age-old." *House NJP Hearings, supra* note 31, at 4900. Interestingly, Representative Rivers was a member of the House subcommittee that considered the UCMJ in 1949. During the original UCMJ hearings, Representative Rivers engaged in two colloquies concerning nonjudicial punishment refusal rights. *House Hearings, supra* note 15, at 736, 933.

During the 1962 Hearings on H.R. 7856, Representative William H. Bates (R-Mass.), questioned the reason for the differences in the services' refusal right provisions. *House NJP Hearings, supra* note 31, at 4910-11. Major General Albert M. Kuhfeld, the Judge Advocate General of the Air Force, responded, in part:

Vinson's bill, however, did not address the right to refuse nonjudicial punishment.[34] On May 15, 1962, the House adopted the bill.[35]

The Senate's consideration of nonjudicial punishment reform proved far more eventful. The day after the House passed the bill, the Senate referred the legislation to the Armed Services Committee.[36] On July 17, 1962, a Senate

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> [I]f a man on board a ship demanded trial by court-martial, the ship's complement wouldn't have the necessary officers to make up a court-martial. They wouldn't have the judge advocates, and they wouldn't have the other people—defense counsel, and so forth. . . . [F]rom the standpoint of an injustice to the individual, even where they have no right to demand a trial in the Navy, we have eliminated practically every possibility of injustice by the setting up of the appeal system we have."

Id. at 4911; *see also id.* at 4911-12 (statement of Captain Mack K. Greenberg, U.S. Navy, Assistant Judge Advocate General for Military Justice, discussing the importance of nonjudicial punishment in the Navy); *id.* at 4912-15 (questioning by Representative Bates, Representative Charles E. Bennett (D-Fla.) and Representative Porter Hardy, Jr. (D-Va.) exploring differences between the Navy's and Army's use of nonjudicial punishment). Because the "Department of Defense delegated to the Air Force responsibility" for presenting the legislation to Congress, Major General Kuhfeld "was the principal spokesman for the amendments before the House and Senate Committees on Armed Services." Walter Kiechel, Jr., *Nonjudicial Punishment*, JAG BULL., Jan-Feb 1963, at 16. For Major General Kuhfed's analysis of the legislation, see Albert M. Kuhfeld, *Amendments to Article 15, Uniform Code of Military Justice*, JUDGE ADVOCATE J., Oct. 1962, at 69, 70.

[34] H.R. 7656, *supra* note 32. *See also House NJP Hearings, supra* note 31, at 4904 (statement of Major General Albert M. Kuhfeld, Judge Advocate General of the Air Force, noting that "the privilege of an accused to demand trial by court-martial in lieu of punishment under article 15 remains the same as it is now under existing law.").

[35] 108 CONG. REC. 8432 (1962). The bill that emerged from the committee, H.R. 11257, was a modified version of the original H.R. 7656. *See* 108 CONG. REC. 6881 (1962) (report of the House Armed Services Committee). The floor debate preceding the House's adoption of the bill included one brief reference to the right to refuse nonjudicial punishment. Representative Rivers indicated, incorrectly, that a servicemember "does not have to accept [nonjudicial] punishment unless he is in the Navy and a ship is generally out in the ocean, and he cannot do anything about it." 108 CONG. REC. 8430. In fact, no member of the Navy, Marine Corps, or Coast Guard could refuse nonjudicial punishment. *See supra* note 30 and accompanying text.

The House floor debate on H.R. 11257 was more notable for its comedic value than for its substance. After Representatives Rivers had delivered a lengthy address in support of the bill, Representative Robert L.F. Sikes (D-Fla.) rose to comment on Representative Rivers' haircut, which Representative Sikes characterized as "the first one in 22 years." 108 CONG. REC. 8249. After Representatives Sikes made a reference to a possible "Samson and Delilah situation here," *id.*, Representative J. Arthur Younger (R-Cal.) asked Representative Rivers "if the gentleman has noticed any lack of power since he has shorn his locks." *Id.*

[36] 108 CONG. REC. 8482 (1962).

Armed Services Subcommittee held hearings on the proposal.[37] Senator Sam Ervin (D-N.C.), the Subcommittee's chairman,[38] played the key role in the vessel exception's creation.[39]

In February and March 1962, Senator Ervin had presided over seven days of hearings by a Senate Judiciary Subcommittee considering the "constitutional rights of military personnel."[40] These hearings delved into many issues, including nonjudicial punishment refusal rights. One of the witnesses who appeared before the Senate Judiciary subcommittee was Colonel D. George Paston, the Chairman of the New York County Lawyers Association's Committee on Military Justice. Colonel Paston argued that members of the naval service and the Coast Guard should have the same right to refuse nonjudicial punishment as members of the Army and Air Force.[41] When the Judge Advocate General of the Navy, Rear Admiral William C. Mott, testified before the subcommittee the next day, he and Senator Ervin discussed nonjudicial punishment refusal rights.[42] Rear Admiral Mott defended the absence of a refusal right in the Navy. He maintained that the refusal right worked well in the Army, where a case could easily move from the nonjudicial punishment authority—the company commander—to the court-martial convening

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[37] *Hearing Before a Subcommittee of the Committee on Armed Services on H.R. 11257*, 87th Cong., 2d Sess. (1962) [hereinafter *Senate NJP Hearing*].

[38] The other members of the subcommittee were Senators Barry Goldwater (R-Ariz.), and Howard W. Cannon (D-Nev.). *Id.* at 1.

[39] For an overview of Senator Ervin's involvement in reforming military justice, see GENEROUS, *supra* note 31, at 186-97.

[40] *Hearings Before the Subcommittee on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962) [hereinafter *Senate Judiciary Subcommittee Hearings*]. Senator Ervin was the subcommittee's chairman. *Id.* at ii. One of the subcommittee's counsel was Robinson O. Everett, who went on to become the Court of Military Appeals' fifth Chief Judge. *Id.*; Thomas J. Feeney & Captain Margaret L. Murphy, *The Army Judge Advocate General's Corps, 1982-1987*, 122 MIL. L. REV. 1, 60 (1988).

[41] *Senate Judiciary Subcommittee Hearings*, *supra* note 40, at 211 (statement of Colonel Paston); *see also id.* at 234-35 (exchange between Colonel Paston, Senator Ervin, and Subcommittee Chief Counsel and Staff Director William A. Creech concerning the feasibility of extending the refusal right to members of the Navy and Coast Guard).

[42] *Id.* at 388-90.

authority—the battalion commander.[43] Rear Admiral Mott argued that affording a similar right would be "difficult if not impossible in the Navy" because of difficulties arising aboard ships at sea.[44] He objected that allowing a Sailor to refuse the commanding officer's punishment "undermines the captain's position of responsibility."[45] He also argued that because no superior officer would be available to convene a court-martial, the result of refusing nonjudicial punishment would be to try the Sailor by a summary court-martial, which would consist of one of the ship captain's subordinate officers.[46] Rear Admiral Mott added that the outcome of pending legislative proposals—including a bill to eliminate summary courts-martial—might lead the Secretary of the Navy to reconsider the service's regulations precluding refusal of nonjudicial punishment.[47]

Subcommittee Counsel Robinson O. Everett subsequently asked Rear Admiral Mott, "[W]hy is it that [this rationale] applies to all sailors in the Navy—and I gather all Marines—whether they are on board ship or whether they are based at Norfolk in a large oceanside installation where plenty of summary court officers would be available?"[48] Rear Admiral Mott replied, "[I]t would be difficult to have one rule for the shore-based commands and a different rule for the ones at sea." He added, "[I]n the interest of uniformity it would be hard to say to a man who was in a destroyer in a port, for instance, 'Well, you don't have the right of election, but if you were at the receiving station here you would.'"[49] Mr. Everett pointed out that Article 15 already made such a distinction by authorizing confinement as a nonjudicial punishment only for

[43] *Id.* at 388.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 389. After Congress approved the 1962 legislation increasing commanding officers' nonjudicial punishment powers, the Department of Defense no longer advocated legislation to eliminate summary courts-martial. GENEROUS, *supra* note 31, at 149-50.

[48] *Senate Judiciary Subcommittee Hearings, supra* note 40, at 395.

[49] *Id.* at 395-96.

personnel attached to or embarked in a vessel.[50] He suggested that the Secretary of the Navy could easily make a similar distinction regarding nonjudicial punishment refusal rights.[51] Rear Admiral Mott agreed, but added, "If the subcommittee has any complaints from naval personnel who have been denied the right to elect court-martial in lieu of mast, I would like to know about them, because we don't have any in the Navy that I know of."[52] After Rear Admiral Mott argued that most Sailors realize they are better off facing nonjudicial punishment than a court-martial, Mr. Everett concluded the discussion by noting that expanding the right to refuse nonjudicial punishment "would be no loss from the Navy's standpoint . . . since it would seldom be exercised."[53]

With the Senate Judiciary Subcommittee hearings as prologue, it is not surprising that Senator Ervin raised the refusal right issue during the Senate Armed Service Subcommittee's hearing on the nonjudicial punishment bill.[54] While Senator Ervin acknowledged that unique circumstances may exist "in a small ship" or "where the ship is at sea," he questioned why neither Navy personnel "on land" nor Marines were entitled to refuse nonjudicial punishment.[55] Senator Ervin argued, "I have never seen anything to indicate that giving this option to a man has substantially affected morale in either the

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[50] *Id.* at 396. The 1962 amendment to Article 15 eliminated the authority to impose confinement for seven days upon personnel attached to or embarked in a vessel. Act of Sept. 7, 1962, Pub. L. No. 87-648, 76 Stat. 447 (codified as amended at 10 U.S.C. § 815 (1994)). The legislation instead authorized correctional custody as a nonjudicial punishment for all enlisted servicemembers. *Id.* at § 1, 76 Stat. at 448-49. The act also allowed nonjudicial punishment authorities who were 0-3s or below to impose seven days of correctional custody. *Id.* Where the officer imposing the punishment was an 0-4 or above, the act authorized the imposition of correctional custody for 30 days. *Id.*, 76 Stat. at 449.

[51] *Senate Judiciary Subcommittee Hearings, supra* note 40, at 396.

[52] *Id.*

[53] *Id.*

[54] More than one-third of the one-hour-and-fifty-minute-long hearing's written transcript was devoted to the nonjudicial punishment refusal right issue. *Senate NJP Hearing, supra* note 37.

[55] *Id.* at 10, 11. Later in the hearing, Lieutenant Colonel Robert A. Scherr of the United States Marine Corps testified that the Commandant opposed giving Marines the right to refuse nonjudicial punishment. *Id.* at 30-32. Lieutenant Colonel Scherr argued that allowing Marines to refuse nonjudicial punishment would reduce the authority of commanders. *Id.* at 31.

Army or the Air Force."[56] He added that "there is a feeling on the part of the public and a feeling on the part of the bar that it ought to be granted, subject, perhaps, to the exclusion of . . . nonjudicial punishment which is given on shipboard."[57]

On August 23, 1962, the Senate Armed Services Committee issued its report on the bill.[58] This report recommended that the legislation be amended to provide that "except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment."[59] The report explained:

> The bill extends to a considerable degree, as compared to existing law, the nonjudicial punishments which may be imposed by a commanding officer. Under such circumstances the committee feels that all military members, except those attached to or embarked in a vessel, should have the statutory right to demand a court-martial in lieu of accepting non-judicial punishment. Except for the military members aboard ship, the effect of the committee amendment will be to continue the existing practice in the Army and Air Force and, at the same time, extend the right to members of the Navy, Marine Corps, and Coast Guard.
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> Because of testimony by the Navy, the right to demand a trial by court-martial in lieu of nonjudicial punishment was not extended to those aboard ship, in view of the unique responsibilities of the ship's captain and in the interest of maintaining morale and discipline aboard ship.

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[56] *Id.* at 11.

[57] *Id.* Lawrence Speiser, the Director of the American Civil Liberties Union's Washington Office, testified in favor of extending the right to refuse nonjudicial punishment. *Id.* at 33-36; *see also id.* at 36-37 (prepared statement of Lawrence Speiser). Mr. Speiser argued that members of the Navy and Marine Corps should generally have the right to refuse, with "exceptions for situations on a ship, and particularly a small ship." *Id.* at 33.

[58] SENATE NJP REPORT, *supra* note 10; *see also* 108 CONG. REC. 17,346 (1962) (recording submission of committee report).

[59] SENATE NJP REPORT, *supra* note 10, at 1.

> Since it would be the ship's commander who would impose nonjudicial punishment, the right to demand a trial would involve (1) the question of maintaining discipline where a person aboard ship could refuse the punishment to be imposed by the commanding officer for minor infractions, and (2) the matter of a [summary] court-martial being conducted by a junior officer appointed by the commanding officer to make a judgment on the same set of facts that have been considered by the commanding officer.[60]

On August 26, 1962, the full Senate adopted the proposed amendment and passed the bill as amended.[61] Before the vote, Senate Armed Services Committee Chairman Richard B. Russell (D-Ga.), informed the Senate that the legislation would provide servicemembers with a right to refuse nonjudicial punishment except "in some cases where a ship is at sea."[62] On August 28, 1962, the House of Representatives agreed to the Senate's amendment,[63] and, on September 7, President Kennedy signed the bill as amended into law.[64]

III. EXECUTIVE BRANCH CONSIDERATION OF THE VESSEL EXCEPTION

The signing of H.R. 11257 marked only the beginning of the Executive Branch's consideration of nonjudicial punishment refusal rights. The Act became effective "on the first day of the fifth month following the month in which it [was] enacted."[65] This led the Kennedy Administration to adopt a

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[60] *Id.* at 1-2; *see also* 108 CONG. REC. 17559-60 (1962) (statement of Senator Mansfield). The committee added that it anticipated "that only in rare cases would it appear that personnel would demand a trial by court-martial. It would be expected that nonjudicial punishment would be accepted for most minor infractions." SENATE NJP REPORT, *supra* note 10, at 2.

[61] 108 CONG. REC. 17,560 (1962).

[62] *Id.* at 17,560.

[63] *Id.* at 17,962.

[64] *Id.* at 19,079.

[65] Act of Sept. 7, 1962, Pub. L. No. 87-648, § 2, 76 Stat. 447, 450 (1962).

deadline of February 1, 1963 for making the necessary changes to the Manual for Courts-Martial, a deadline it would barely meet.[66]

On December 28, 1962, the Secretary of the Air Force forwarded to the Director of the Bureau of the Budget a proposed Executive Order containing the suggested Manual changes.[67] The proposed Executive Order then worked its way down Pennsylvania Avenue, receiving recommendations from the Bureau of the Budget and the Treasury Department before being forwarded to the Justice Department.[68]

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[66] *See* Memorandum by Assistant Attorney General, Office of Legal Counsel, Norbert A. Schlei, "Re: Proposed Executive order entitled, 'Amending the Manual for Courts-Martial, United States, 1951, to implement section 815 of title 10, United States Code, relating to nonjudicial punishment" (Jan. 29, 1963) [hereinafter Schlei Memorandum] (on file with John Fitzgerald Kennedy Library, Boston, Mass.) (the Schlei Memorandum is set out in its entirety in Appendix A). The Schlei Memorandum indicated that the executive order "should be issued not later than February 1, 1963, the effective date of the new nonjudicial punishment provisions under Public Law 87-648." *Id.* at 3. *See also* letter from Assistant Attorney General Norbert A. Schlei to President Kennedy 1-2 (Jan. 29, 1963) (on file with John Fitzgerald Kennedy Library, Boston, Mass.) [hereinafter Schlei Letter] (the Schlei Letter is set out in its entirety in Appendix B) (noting, "Inasmuch as Public Law 87-648 becomes effective on February 1, 1963, this order should be issued by that date.").

[67] Letter from Secretary of the Air Force Eugene M. Zuckert to Director of the Bureau of the Budget David E. Bell (Dec. 28, 1962) (on file with John Fitzgerald Kennedy Library, Boston, Mass.). The letter noted:

> Paragraph 132 implements the provisions of Article 15(a) which gives the members of all the armed forces the right to demand trial by court-martial in lieu of punishment under Article 15, except when they are attached to or embarked in a vessel. This paragraph specifically defines the phrase "attached to or embarked in a vessel."

Id. at 3.

[68] Letter from G. d'Andelot Belin, General Counsel of the Treasury, to the Director of the Bureau of the Budget (Jan. 16, 1963) (on file with the John Fitzgerald Kennedy Library, Boston, Mass.); letter from Arthur B. Focke, General Counsel of the Bureau of the Budget, to Attorney General Robert F. Kennedy (Jan. 21, 1963) (on file with the John Fitzgerald Kennedy Library, Boston, Mass.).

On January 29, 1963, Assistant Attorney General Norbert A. Schlei[69] signed a four-page memorandum concerning the proposed executive order.[70] The Schlei Memorandum provides crucial evidence of the original understanding of the vessel exception's scope:

> The new paragraph 132 of the Manual of Courts-Martial proposed by this order . . . prescribes regulations implementing that exception. It appears that the language of that paragraph could be construed to deny the right of election to members who are assigned to organizations which have received overseas travel orders even though those organizations are still at duty stations that are considerably removed from the vessel involved, and without regard to whether actual boarding of the vessel is planned for the immediate future (for example, an organization at a base 100 miles from the port involved, and scheduled for overseas shipment 30 days in the future). This would appear to be inconsistent with the congressional intent.
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> Representatives of the Air Force, on behalf of all the services, state that the military services have no intention of denying an election to any member pursuant to paragraph 132 unless he is either aboard [a] vessel or unless he is in the immediate vicinity of a vessel and is in the process of boarding. The only exception to that rule would involve the possible denial of election to members attached to vessels who are absent without authority in foreign ports.

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[69] Following a distinguished legal career, on January 5, 1995, Mr. Schlei was convicted of securities fraud and conspiracy to sell counterfeit foreign bank notes. Karen Donovan, *The Upending of a Camelot Knight*, NAT'L L.J., Apr. 10, 1995, at A1; Rick Bragg, *Stalwart of the Kennedy Justice Dept. Finds His World in Ashes After a Trial*, N.Y. TIMES, Apr. 14, 1995, at D19; Karen Donovan, *A Risk-Taker Faces an Unimpressed Judge*, NAT'L L.J., Aug. 21, 1995, at A10. *See also* Norbert A. Schlei, *The Truth Is, I Am Clean*, NAT'L L.J., May 22, 1995, at A20; William K. Schlei, *Schlei Did What Any Good Lawyer Would Do*, NAT'L L.J., May 8, 1995, at A24.

[70] Schlei Memorandum, *supra* note 66. The documents concerning Executive Order 11081 do not indicate whether the Schlei Memorandum was forwarded to President Kennedy and the John Fitzgerald Kennedy Library's archivists are unable to determine whether President Kennedy received the Schlei Memorandum. Letter from June Payne, Research Assistant, John Fitzgerald Kennedy Library, to author (Aug. 23, 1994) (on file with the author). President Kennedy's personal view of the vessel exception would have been particularly interesting since he commanded three small Navy vessels during World War II. *See generally* JOAN BAIR & CLAY BAIR, JR., THE SEARCH FOR JFK 154-305 (1976) (discussing President Kennedy's World War II service).

> Since this order should be issued by not later than February 1, 1963, the effective date of the new nonjudicial punishment provisions under Public Law 87-648, since the services feel that it would take considerable time to prepare a technically acceptable substitute for paragraph 132, and since the services have agreed to administer paragraph 132 in conformity with the above-described understanding, it seems preferable to accept 132 rather than risk complications that might arise if the order is not issued by February 1.
>
> In order to avoid any misunderstanding concerning this matter, a copy of this memorandum is being transmitted to the Air Force representatives who have agreed to disseminate its contents to the other services.[71]

On the same day that he signed this memorandum, Assistant Attorney General Schlei forwarded a copy of the proposed Executive Order to President Kennedy for his signature.[72] Later that day, President Kennedy signed Executive Order 11081, which implemented the vessel exception.[73] With some minor stylistic changes, the provisions of Executive Order 11081 remain in place today.[74]

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[71] Schlei Memorandum, *supra* note 66, at 3.

[72] Schlei Letter, *supra* note 66.

[73] Executive Order 11,081 amended paragraph 132 of the 1951 Manual for Courts-Martial to provide:

> 132. RIGHT TO DEMAND TRIAL.—Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. A person is attached to or embarked in a vessel if, at the time the nonjudicial punishment is imposed, he is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body. If the member is attached to or embarked in a vessel, he does not have the right to demand trial by court-martial in lieu of punishment under this article unless this right shall have been specifically granted by regulations of the Secretary concerned.

Executive Order No. 11,081, 28 FED. REG. 945 (1963), *reprinted in* ADDENDUM TO THE MANUAL FOR COURTS-MARTIAL, United States, 1951, ¶ 132 (1963).

[74] *Compare id. with* 1995 MCM, *supra* note 4, pt. V, ¶3, which provides:

> Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before the imposition of nonjudicial punishment, demanded trial by court-martial in lieu of nonjudicial

The Schlei Memorandum indicated that the military services agreed that the vessel exception would apply in only three circumstances: (1) if the servicemember is aboard a vessel; (2) if the servicemember is in the immediate vicinity of the vessel and is in the process of boarding; or (3) if a servicemember who is attached to a vessel becomes an unauthorized absentee in a foreign port. Nothing in the Schlei Memorandum indicates that vessels' crewmembers were exempt from this agreement. Rather, the memorandum broadly states that "all the services" agreed that they would not deny "an election to *any member*" absent one of the three special conditions.[75]

Unfortunately, one crucial aspect of the Schlei Memorandum's wording is imprecise. The Memorandum states that the services will allow a member to refuse nonjudicial punishment unless "he is either aboard [a] vessel or unless he is in the immediate vicinity of a vessel and is in the process of boarding," or "absent without authority in [a] foreign port[]." Because the election decision is made at the time nonjudicial punishment is imposed, rather than at the time of the offense, this language implies that the vessel exception's applicability depends upon whether one of these conditions applies *at the time of the nonjudicial punishment hearing*. However, this implied meaning cannot be a correct interpretation of the Schlei Memorandum. The second of the Schlei memorandum's exceptions refers to a servicemember who is "in the immediate vicinity of a vessel and is in the process of boarding," while the third refers to servicemembers who are attached to vessels and "absent without authority in foreign ports." Obviously, it is unlikely that a nonjudicial punishment hearing would be held near a ship while boarding is occurring; it is impossible to hold a nonjudicial punishment hearing while the servicemember is an unauthorized absentee. Accordingly, the three exceptions must refer to the time when the offense is committed. This raises the question of what rule should prevail if one of the three exceptions applies at the time of the offense, but none applies at the time of the nonjudicial punishment hearing. For example, what would occur if a submarine crewmember committed an offense aboard his vessel, but at the

punishment. This right may also be granted to a person attached to or embarked in a vessel if so authorized by regulations of the Secretary concerned. A person is "attached to" or "embarked in" a vessel if, at the time nonjudicial punishment is imposed, that person is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

[75] Schlei Memorandum, *supra* note 66, at 3 (emphasis added).

time of nonjudicial punishment the crew was no longer aboard the submarine?[76] Unfortunately, the Schlei Memorandum does not answer that question.

IV. JUDICIAL CONSIDERATION OF THE VESSEL EXCEPTION

A. *The Judiciary's Expansive Interpretation of the Vessel Exception*

Since 1963, military appellate courts and Article III courts have considered several cases dealing with the vessel exception. Until 1994,[77] the judiciary uniformly interpreted the vessel exception expansively, ruling against the crewmember in every case.

The first reported case construing the vessel exception was the United States District Court for the Northern District of California's decision in *Jones v. Frudden*.[78] Jones was a petty officer assigned to the USS GRIDLEY (CG 21).[79] While the GRIDLEY was docked and undergoing repairs at a shipyard in California, Jones was accused of insubordinate conduct toward a chief petty officer. Although Jones requested trial by court-martial, he was taken to a nonjudicial punishment proceeding where the ship's captain reduced him one pay grade and ordered that he forfeit half of one month's pay. Jones's alleged insubordination occurred on July 23, 1973, the nonjudicial punishment was imposed seven days later, and the GRIDLEY did not leave the shipyard until November 25, 1973. After Jones unsuccessfully appealed the nonjudicial punishment through his chain-of-command, he sought relief from a United States District Court.

Before the district court, Jones argued that "legislative history and reason lead to the conclusion" that the vessel exception's use of the phrase "attached to or embarked in a vessel" applies "to sea-going operations or short stop-overs in port," but not to a vessel that "has been at anchor for some time and where the administrative facilities of a shoreside base . . . were readily

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[76] *See infra* notes 88-94 and accompanying text (discussing Bennett v. Tarquin, 466 F. Supp. 257 (D. Haw. 1979)).

[77] *See infra* notes 120-30 and accompanying text.

[78] 4 Mil. R. Rep. (Pub. L. Educ. Inst.) 2606 (N.D. Cal. Nov. 29, 1976).

[79] The facts of the case appear at *id.* at 2606.

available."[80] After reviewing the history of nonjudicial punishment and the 1962 statute creating the vessel exception, the district court concluded that the "legislative history is not definitive, for the measures were not controversial and generated relatively little discussion, and in no instance was the particular circumstance present here before either the Senate or House of Representatives."[81] The district court ruled, "Nothing in the reported legislative history of Article 15(a) persuades the court that its proviso was intended to be limited to ships at sea."[82]

While the court did not cite the Schlei Memorandum, the nonjudicial punishment involved in this case did not violate the services' agreement memorialized by that document. The court's opinion suggests that both the misconduct and the nonjudicial punishment hearing occurred aboard a ship. Even though Jones's ship was in a domestic port undergoing repairs that took longer than four months to complete, the first of the Schlei Memorandum's three conditions applied.

In 1978, the Navy Court of Military Review decided *United States v. Penn*,[83] which involved a Sailor's challenge to the admissibility of nonjudicial punishments records at a later special court-martial sentencing hearing. The defense contended that the vessel exception violated Penn's equal protection rights. The defense argued that even if the Constitution allows the vessel exception to be applied to those at sea, "his ship was in port on all four occasions of nonjudicial punishment, and there is certainly no justification for discriminating between those attached to a ship in port and those assigned to shore-based commands."[84] The court rejected that argument, reasoning:

> If those attached to a ship were permitted to demand special or general court-martial for any minor offense whenever the ship was in port, commanders frequently would be confronted

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[80] *Id.*

[81] *Id.* at 2607.

[82] *Id.* The opinion ignored Senator Russell's statement during the floor debate that the right to refuse nonjudicial punishment would apply except "in some cases where a ship is at sea." 108 CONG. REC. 17,560 (1962) (statement of Senator Russell); *see supra* note 62 and accompanying text for a discussion of Senator Russell's statement.

[83] 4 M.J. 879 (N.C.M.R. 1978).

[84] *Id.* at 883.

> with totally unacceptable alternatives: (1) Leaving accused persons and all witnesses ashore when ships put out to sea; (2) regulating ships' itineraries around courts-martial; or (3) permitting minor infractions to go unpunished.
>
> To effectively accomplish his mission, a ship's captain must have an adequate and relatively stable crew. Ship's [sic] operations and movements cannot be dictated by those few who choose to violate the law and regulations. To permit minor infractions to go unpunished defeats the very purpose of the Article 15(a) delineation between those attached to or embarked in vessels and other members of the armed forces.[85]

The *Penn* opinion is fundamentally flawed. The Court of Military Appeals has cautioned that "a court should never lose sight of the fundamental rule in criminal procedure that an accused is presumed to be innocent of the offense of which he is charged."[86] The Navy Court ignored that guidance and overlooked entirely the possibility that a servicemember at a nonjudicial punishment hearing might be innocent. By referring to "those few who choose to violate the law and regulations" and allowing "minor infractions to go unpunished," the opinion assumes that servicemembers who receive nonjudicial punishment are actually guilty. But what of an innocent person who is told to appear at a nonjudicial punishment hearing? Presumably such a servicemember is among those most likely to desire an adversarial judicial proceeding, yet the Navy Court's opinion does not even contemplate such an innocent person.

Like the Northern District of California's opinion in *Jones v. Frudden*,[87] *Penn* did not cite the Schlei Memorandum. As with *Jones*, however, if the misconduct occurred aboard a ship and the resulting nonjudicial punishment was imposed aboard a ship, the nonjudicial punishment would be permitted by the Schlei Memorandum's first condition.

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[85] *Id.* Senior Judge Newton dissented from the court's affirmance of Penn's sentence. He argued that while servicemembers attached to or embarked in vessels should not have a right to refuse nonjudicial punishment, such punishment imposed without the protection of *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977), should not be admissible at a later court-martial. *Penn*, 4 M.J. at 887-89 (Newton, S.J., dissenting). For a discussion of *Booker*, see *infra* note 98.

[86] United States v. Moore, 15 C.M.A. 345, 347, 35 C.M.R. 317, 319 (1965) (quoting United States v. Martin, 15 C.M.R. 796, 804 (A.F.B.R. 1954)).

[87] *See supra* notes 78-82 and accompanying text (discussing *Jones v. Frudden*).

The issue of the refusal right's proper scope next arose before a federal district court in Hawaii. In *Bennett v. Tarquin*,[88] several Sailors attached to a ballistic missile submarine argued that the vessel exception did not apply to them during a six-month period when they were ashore. Nuclear submarines operate with two different crews, referred to as the Blue Crew and the Gold Crew. One crew operates the submarine while the other crew remains ashore. At the end of the submarine's patrol, the two crews switch places.[89] In *Bennett*, the court concluded that even while the Gold Crew was operating the submarine, the Blue Crew's Sailors fell under the vessel exception while they were ashore. The court reasoned that a ballistic submarine's crewmember "is on sea duty as opposed to shore status for the entire time he is assigned to the vessel (to the same extent that a surface ship Sailor is still attached to a vessel while in port)."[90] After pointing to several indicia that the off crew remained in a "sea status,"[91] the court emphasized the need of each crew's "Commanding Officer to maintain the efficiency and discipline of his crew, to

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[88] 466 F. Supp. 257 (D. Haw. 1979).

[89] *See generally* Richard Halloran, *Submarines Now Dominate U.S. Nuclear Forces*, N.Y. TIMES, Nov. 27, 1987, at A32.

[90] 466 F. Supp. at 260.

[91] The court observed:

> A. Assignment orders show the sailor's official military address as the ship;
> B. The sailor draws submarine pay for the entire time he is attached to the vessel, whether in on or off-crew status, this is done in order to provide more subsistence funds when the crew must buy meals ashore;
> C. Pro-rata living expenses while in an off-crew status are tax deductible, being ruled temporary duty by the Internal Revenue Service. Even where crew members live in government or private homes ashore, such homes have been ruled to be temporary, away from their permanent home aboard ship. Armed Forces Tax Guide, NAVSO-P 1983;
> D. During the first part of off-crew status after returning from patrol, the sailors are afforded a liberal liberty policy; afterward, the crew deals with matters of the ship's administration, culminating in the latter phase with intensive refresher training to prepare for the next patrol;
> E. All off-crew personnel are subject to instant recall to their ship as a replacement for their on-crew counterpart, if such action is necessary for the accomplishment of the ship's mission;
> F. At no time does the administration of discipline over the off-crew fall upon a person other than the Commanding Officer;
> G. Sailors assigned to a two-crew nuclear submarine are administratively credited with a full sea tour, notwithstanding the fact that a significant percentage of the tour is spent in off-crew status.

Id.

insure a high state of readiness. Nothing in the legislative history would indicate that it was Congressional intent to alter this responsibility."[92]

Bennett demonstrates that by 1973, when the nonjudicial punishments were imposed, the Navy no longer followed its agreement that was memorialized by the Schlei Memorandum. The *Bennett* decision involved nonjudicial punishments imposed on five Sailors. None of the five was aboard a vessel when he received nonjudicial punishment. Two of the five allegedly possessed and used marijuana at the Pearl Harbor naval station; the other three allegedly used and possessed (and, in one case, allegedly distributed) marijuana aboard their submarine.[93] Under the Schlei Memorandum and the services' underlying agreement, the two Sailors who allegedly committed offenses ashore should have been entitled to refuse nonjudicial punishment. Unfortunately, the *Bennett* decision does not discuss—or even cite—the Schlei Memorandum. In addition to indicating the Navy's abrogation of its 1962 agreement, the *Bennett* case represented an extremely expansive judicial interpretation of the vessel exception. As one commentator has noted, submarine Sailors on shore for a six-month period bear no resemblance to the operational situations that Congress considered when it adopted the vessel exception in 1962.[94]

In *United States v. Forester*,[95] the Navy Court of Military Review continued the judiciary's broad construction of the vessel exception. *Forester* involved the admissibility of a record of nonjudicial punishment received while the accused was assigned to a submarine's precommissioning unit. The defense argued that because Forester did not receive the right to refuse the nonjudicial punishment, the record of that punishment should not be admitted at court-martial. The Navy Court disagreed, concluding that the vessel exception applies to all "commissioned ships of the U.S. Navy" as well as to "newly constructed ships which have been duly designated 'in commission, special,' and 'in service.'"[96]

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[92] *Id.*

[93] *Id.* at 259.

[94] Salisbury, *supra* note 3, at 866-67.

[95] 8 M.J. 560 (N.C.M.R. 1979).

[96] *Id.* at 564. The court explained:

> Current practice indicates that a new conventionally powered surface ship or submarine is commissioned at or shortly after the date of delivery to the Navy; nuclear powered surface ships and submarines, such as the USS MEMPHIS (SSN-691), are

The following year, the Navy Court of Military Review construed the vessel exception in an unpublished opinion. In *United States v. Thomas*,[97] the defense objected to the admissibility of records of nonjudicial punishments imposed without *Booker* warnings[98] while Thomas was assigned to a floating dry dock. Ruling that "all commissioned ships of the Navy clearly fall within the category of vessels for purposes of Article 15, UCMJ,"[99] the court held that the floating dry dock was a vessel despite having no means of propulsion.

After *Thomas*, the issue of the vessel exception's scope laid dormant for more than a decade.[100] Two Court of Military Appeals decisions in the early

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normally placed "in commission" concurrent with delivery by the builder to the Navy. This status signals approximate readiness for the performance of all mission requirements. Further, nuclear powered surface ships and submarines in construction normally are assigned to an active status of "in service" when they are ready for sea. This usually occurs prior to underway builder's trials and during the period beginning approximately two weeks before commencement of the first sea trials and ending with delivery of the ship. At this time the prospective commanding officer, who is also commanding officer of the precommissioning unit, becomes officer-in-charge of the ship. Another similar category, "in commission, special," applies to all other new ships, except non-nuclear submarines, at the point at which the ship, although not yet commissioned, is capable of underway operation. About two months prior to delivery and prior to the first underway builder's trial, a non-nuclear submarine undergoing construction is placed "in commission"/"in service," depending upon whether construction takes place in a private or naval shipyard.

Id. at 564 (footnotes and citations omitted).

[97] No. 79-0006 (N.C.M.R. Oct. 16, 1980).

[98] *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978), holds that a record of nonjudicial punishment is admissible at a subsequent court-martial only if the servicemember was advised of the right to refuse nonjudicial punishment and given an opportunity to consult with a lawyer. In 1995, the Navy-Marine Corps Court of Criminal Appeals ruled that *Booker* was no longer valid due to changes in Supreme Court case law. United States v. Kelly, 41 M.J. 833 (N.M. Ct. Crim. App. 1995). The *Kelly* case is currently pending before the Court of Appeals for the Armed Forces. United States v. Kelly, 43 M.J. 172 (1995) (order granting petition for review). The Navy-Marine Corps Court has suggested that even if the Court of Appeals for the Armed Forces were to affirm the *Kelly* holding, an issue as to the admissibility of a record of nonjudicial punishment might remain if the accused was improperly denied the right to refuse nonjudicial punishment. United States v. Edwards, 43 M.J. 619, 620 n.1 (N.M. Ct. Crim. App. 1995), *petition granted*, 44 M.J. 65 (1996) (order).

[99] *Thomas*, No. 79-0006, slip op. at 2 (N.C.M.R. Oct. 16, 1980).

[100] The dearth of cases in this area is not surprising. Military appellate courts do not possess direct review jurisdiction over nonjudicial punishments. *See* UCMJ art. 66. With the exception of the stay of proceedings issued in *Fletcher v. Covington*, 42 M.J. 215 (1995) (order), military appellate courts have refused to grant extraordinary relief over nonjudicial punishment proceedings. *See* Slater v.

1980's, however, demonstrated the vessel exception's potential for abuse. In *Dobzynski v. Green*,[101] a Sailor was taken to a special court-martial on a marijuana possession charge. The military judge granted a motion to suppress the marijuana. The convening authority—a guided missile cruiser's commanding officer—withdrew the charges from court-martial and nonjudicially punished the Sailor.[102] Because Dobzynski was a member of the ship's crew, the convening authority was able to impose nonjudicial punishment over his objection.[103] The Court of Military Appeals' majority concluded "that the charges were properly withdrawn from the special court-martial and that the Article 15 punishment was properly imposed."[104] Nevertheless, the majority chastised the convening authority for creating "at the very least" an "impression of injustice."[105]

Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet[106] arose from the general court-martial of a Sailor facing charges concerning an alleged

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Kamrath, 33 M.J. 491 (C.M.A. 1991) (denying writ appeal petition where "it appears neither a court-martial proceeding has ever been contemplated nor has there been an allegation that appellant was attached to or embarked in a vessel for the purpose of defeating her right to demand trial by a court-martial"); Whalen v. Stokes, 19 C.M.A. 636 (1970) (indicating that nonjudicial "punishment is not reviewable by this Court under the provisions of Article 67(b) of the Code"); Stewart v. Stevens, 5 M.J. 220, 220-22 (C.M.A. 1978) (Cook, J., concurring) (arguing that the Court of Military Appeals "has no jurisdiction to entertain a petition to inquire into the legality of Article 15 . . . proceedings"); Dukes v. Smith, 34 M.J. 803, 806 (N.M.C.M.R. 1991) (en banc) (holding that the Navy-Marine Corps Court does not possess extraordinary relief jurisdiction over nonjudicial punishments). *See also* Thompson v. Abbot, 32 M.J. 493 (C.M.A. 1991) (summary disposition) (denying petition for extraordinary relief where, over his objection, a Sailor was nonjudicially punished after the convening authority withdrew his case from a special court-martial). Military appellate court decisions dealing with the vessel exception have arisen through litigation over the admissibility of nonjudicial punishment records at a later court-martial.

[101] 16 M.J. 84 (C.M.A. 1983).

[102] The convening authority imposed 45 days' restriction, 45 days' extra duty, and forfeiture of $250 pay per month for two months. *Id.* at 85.

[103] *See id.* at 87 (Everett, C.J., dissenting) (noting that "the convening authority withdrew the charges from the special court-martial because of insufficiency of the evidence [following the marijuana's suppression] and, over objection, proceeded with nonjudicial punishment.").

[104] *Id.* at 86; *but see id.* at 86-89 (Everett, C.J, dissenting) (maintaining that this process violated Dobzynski's rights and that the Court of Military Appeals possessed jurisdiction to order relief).

[105] *Id.* at 85.

[106] 18 M.J. 198 (C.M.A. 1984).

drug conspiracy. At the conclusion of the government's case-in-chief, the military judge granted a motion for a finding of not guilty.[107] The command later nonjudicially punished Jones for misconduct that included the allegations of which he had been acquitted. Jones was then administratively separated from the Navy with an other than honorable discharge. Jones, who was assigned to a ship, petitioned the Court of Military Appeals for a writ of mandamus to set aside the nonjudicial punishment and annul the administrative discharge. A divided court dismissed the petition for extraordinary relief,[108] but all three judges criticized the imposition of nonjudicial punishment in the case.[109] Despite the "flagrant abuse"[110] of nonjudicial punishment in *Dobzynksi* and *Jones*, neither case disturbed the vessel exception that made such abuse possible.

B. *The Court of Military Appeals' Confinement on Bread and Water Cases*

In 1992, the Court of Military Appeals returned to the issue of who is "attached to or embarked in a vessel." This time, the issue arose in connection

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[107] *Id.* at 199.

[108] *Id.* at 199 (per Fletcher, J.). The court's three judges issued three separate opinions. The lead opinion, written by Judge Fletcher, found that any error in the case did not rise "to the level requiring extraordinary relief." *Id.* Senior Judge Cook concluded that the court "simply lack[s] jurisdiction" over nonjudicial punishment and administrative discharges. *Id.* at 199 (Cook, S.J., concurring). Chief Judge Everett argued that the court should order "that the nonjudicial punishment be set aside." *Id.* at 203 (Everett, C.J., dissenting). Chief Judge Everett reserved judgment on whether the court had the power to order extraordinary relief concerning Jones's administrative discharge. *Id.* at 203 n.4 (Everett, C.J., dissenting).

[109] Judge Fletcher warned that "this case foreshadows unreasonable-abuse of command disciplinary powers which cannot be tolerated in a fundamentally fair military justice system." *Id.* at 198-99 (per Fletcher, J.). Senior Judge Cook referred to the "unseemly manner in which this nonjudicial punishment arose." *Id.* at 199 (Cook, S.J., concurring in the result). Chief Judge Everett criticized the command action in *Jones* as "an even more flagrant misuse of Article 15" than that in *Dobzynski*. *Id.* at 200 (Everett, C.J., dissenting).

The Manual of the Judge Advocate General now prevents a repeat of the *Jones* scenario. Section 0124d provides, "Personnel who have been tried by courts that derive their authority from the United States, such as U.S. District Courts, shall not be tried by court-martial or be the subject of nonjudicial punishment for the same act or acts." JAGMAN, *supra* note 6, at 0124d. Because a court-martial derives its authority from the United States, a court-martial proceeding bars a later nonjudicial punishment for the same misconduct.

[110] *Jones*, 18 M.J. at 200 (Everett, C.J., dissenting).

with confinement on bread and water.[111] Before 1995, courts-martial could sentence enlisted servicemembers "attached to or embarked in a vessel" to confinement on bread and water for up to three days.[112] In both *United States v. Yatchak* and *United States v. Lorance*, the accused was assigned to the USS KITTY HAWK (CV 63) while it was undergoing a long-term overhaul at the Philadelphia Naval Shipyard.[113] In both cases, the accused received a sentence that included confinement on bread and water and served that sentence in the Philadelphia Naval Station's brig.[114]

The Court of Military Appeals concluded that neither Yatchak nor Lorance was "'attached to or embarked in a vessel,' as that phrase was used by Congress."[115] After reviewing the legislative history of Article 15(b)(2)(A)'s limitation on confinement on bread and water, the court noted that "Congress reluctantly authorized confinement on bread and water for those 'at sea' in response to the Navy's argument that it 'was one of the few effective

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[111] United States v. Yatchak, 35 M.J. 379 (C.M.A. 1992); United States v. Lorance, 35 M.J. 382 (C.M.A. 1992). *See also* United States v. Valead, 32 M.J. 122, 126-28 (C.M.A. 1991) (Everett, S.J., concurring) (discussing when a servicemember is "attached to or embarked in a vessel" for confinement on bread and water purposes). The author was the appellate defense counsel in *Yatchak*, *Lorance* and *Valead*.

[112] MANUAL FOR COURTS-MARTIAL, UNITED STATES, Rule for Courts-Martial (R.C.M.) 1003(b)(9) (1994 edition) [hereinafter 1994 MCM]; *see also* UCMJ art. 15(b)(2)(A) (allowing confinement on bread and water as a nonjudicial punishment for enlisted personnel attached to or embarked in a vessel). A 1995 amendment to the Manual for Courts-Martial eliminated the authority of courts-martial to adjudge confinement on bread and water. *See* 1995 MCM, *supra* note 4, R.C.M. 1003 analysis, app. 21, at A21-69. The drafters' analysis explains:

> Punishment of confinement on bread and water or diminished rations [R.C.M. 1003(d)(9)], as a punishment imposable by a court-martial, was deleted. Confinement on bread and water or diminished rations was originally intended as an immediate, remedial punishment. While this is still the case with nonjudicial punishment (Article 15), it is not effective as a court-martial punishment.

Id. (bracketed material in the original) (the drafters' analysis incorrectly refers to "R.C.M. 1003(d)(9)"; the correct citation is R.C.M. 1003(b)(9)).

[113] *Yatchak*, 35 M.J. at 380; *Lorance*, 35 M.J. at 383.

[114] *Yatchak*, 35 M.J. at 380; *Lorance*, 35 M.J. at 383.

[115] *Yatchak*, 35 M.J. at 381; *Lorance*, 35 M.J. at 384.

punishments available for imposition aboard ship.'"[116] The court cited a 1953 decision holding that Article 55's proscription against cruel or unusual punishments precluded confinement on bread and water as a court-martial

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[116] *Yatchak*, 35 M.J. at 380 (quoting United States v. Wappler, 2 C.M.A. 393, 395, 9 C.M.R. 23, 25 (1953)). As originally drafted, the UCMJ did not limit confinement on bread and water to servicemembers attached to or embarked in a vessel. H.R. 2498, 81st Cong., 1st Sess. art. 15(a)(2)(F), *reprinted in House Hearings, supra* note 15, at 570. Instead, confinement on bread and water for five days was an authorized nonjudicial punishment for all enlisted personnel. *Id.* This provision arose from the Department of the Navy's insistence that "restriction, to a man on a vessel at sea, was hardly a punishment and some special type of confinement or other punishment might be necessary in some cases for the sake of discipline." Major Roger M. Currier, *Non-Judicial Punishment in* LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES 208 (1951).

Richard Wels, chairman of the New York County Lawyers' Association's Special Committee on Military Justice, appeared before the House subcommittee that initially considered the UCMJ. Mr. Wels characterized confinement on bread and water as a "cruel and barbaric" punishment that "fit[s] in the same category as the floggings, brandings, and tattooings which are specifically prohibited by article 55." *House Hearings, supra* note 15, at 643. Mr. Wels acknowledged that the Department of the Navy contended confinement on bread and water was necessary because "merely confining a man at sea is no punishment, since it operates merely to free him from the performance of his duties." *Id.* He responded, "Other punishments are available, however. At the very least, this section should be limited so that a man may be confined on bread and water only while he is at sea." *Id.*

The House Armed Services Committee ultimately narrowed the class of servicemembers subject to confinement on bread and water. Representative Rivers proposed an amendment "[l]imiting the Navy to bread and water aboard ship or on the high seas—or any other branch of the service that operates ships." *Id.* at 945. Such confinement would be allowed "[a]t sea or aboard ship, where they may be tied up at a dock." *Id.* Felix Larkin, Assistant General Counsel of the Office of the Secretary of Defense, noted a "difficulty about construing the proposed language: What about the case where two stewards are assigned to a ship as part of its crew and it is in harbor. Suppose they get into a fight on the dock, are they aboard ship or are they not?" *Id.* at 946. Representative Rivers replied, "Technically, they are aboard ship because they are assigned to the ship." *Id.* Mr. Larkin suggested that "'assigned to the ship' may be better language." *Id.* Representative Charles Elston (R-Ohio) observed that if confinement on bread and water were limited to sailors "aboard ship," then a commander could not impose such punishment on two sailors who fought on the dock the day before their ship went underway. *Id.* He added, "The commander would not have the same authority over them that he wants to have while he is in command of a ship." *Id.* Representative Overton Brooks (D-La.) suggested, "You could say 'attached to or aboard a ship.'" *Id.* During the following day's session, the committee voted to permit confinement on bread and water only "[i]f imposed upon a person attached to or embarked in a vessel." *Id.* at 1263.

The House Armed Services Committee's final report on the proposed UCMJ noted that Article 15 originally provided for confinement on bread and water or diminished rations for up to five days. The report stated, "We are of the opinion that this type of disciplinary punishment should not be used ashore." HOUSE REPORT, *supra* note 1, at 6. *See also* 96 CONG. REC. 1358 (1949) (statement of Sen. Kefauver) (explaining that the Senate Armed Services Committee "felt that the more severe penalties of the Navy, involving confinement for 7 days and bread and water for 5 days, should be imposed only at sea where there is reason and justification for their application," and that confinement on bread and water should be limited to 3 days).

punishment unless the accused was attached to or embarked in a vessel.[117] The court concluded that Article 15(b)(2)(A)'s legislative history "reflects that Congress devised the term, 'attached to or embarked in a vessel,' to cover those actually at sea as well as those in port when their ship is about to depart."[118] The court therefore held that Yatchak's and Lorance's confinement on bread and water violated Article 55.[119]

C. *Applying* Yatchak *and* Lorance *to the Vessel Exception*

The *Yatchak* and *Lorance* opinions set the stage for the next round of litigation over the nonjudicial punishment refusal right's vessel exception. In *United States v. Gilbert*,[120] the accused pled guilty and was convicted of unauthorized absence at a special court-martial. During its sentencing case, the government offered a record of nonjudicial punishment imposed by the

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[117] *Yatchak*, 35 M.J. at 380 (citing *Wappler*, 2 C.M.A. 393, 9 C.M.R. 23).

[118] *Yatchak*, 35 M.J. at 381 (citing *House Hearings, supra* note 15, at 945-46). Chief Judge Sullivan concurred in the result. Citing the court's holding in *United States v. Valead*, 32 M.J. 122 (C.M.A. 1991), Chief Judge Sullivan indicated that the imposition of confinement on bread and water was improper because it was executed before the convening authority approved it. *Yatchak*, 35 M.J. at 381 (Sullivan, C.J., concurring in the result); *see also Lorance*, 35 M.J. at 384 (Sullivan, C.J., concurring in part and in the result) (finding that Fireman Apprentice Lorance's sentence to confinement on bread and water was also executed too early).

Judge Wiss also concurred in the result, emphasizing that because the "Government and defense agree that the USS *KITTY HAWK* was never in an operational status throughout the period here in question," neither accused was "'attached to or embarked in a vessel' as that phrase was used by Congress in Article 15(b)(2)(A) . . . or in RCM 1003(b)(9)." *Yatchak*, 35 M.J. at 381 (Wiss, J., concurring in the result) (internal quotation marks omitted); *see also Lorance*, 35 M.J. at 384 (Wiss, J., concurring in part and in the result). Judge Wiss continued:

> I expressly disassociate myself, however, from that portion of the majority opinion which cites a brief segment of the legislative history dealing with the phrase "attached to or embarked in a vessel." In my view, the full legislative history does not support the limited construction of the phrase as is indicated in this dicta of the majority opinion.

Yatchak, 35 M.J. at 381 (Wiss, J., concurring in the result) (internal citations omitted).

[119] *Yatchak*, 35 M.J. at 381; *Lorance*, 35 M.J. at 384. Lorance's confinement on bread and water was also improper because he served that sentence after a medical officer certified that subjecting Lorance to confinement on bread and water would "produce serious injury" to his health. *Id.* at 383. Thus, the sentence was executed in violation of R.C.M. 1113(d)(5), which prohibits confinement on bread and water unless a medical officer has certified that such punishment "will not . . . produce serious injury to the health of the accused." 1995 MCM, *supra* note 4, R.C.M. 1113(d)(5).

[120] No. 93-0019 (N.M.C.M.R. Feb. 9, 1994) (per curiam). The author was Seaman Gilbert's appellate defense counsel.

commanding officer of the USS CONSTELLATION (CV 64)[121] nineteen months after the ship began an overhaul and approximately one year before the CONSTELLATION left the shipyard for a ten-day sea trial.[122]

The defense objected to the nonjudicial punishment's consideration due to an absence of *Booker* warnings.[123] The defense counsel maintained that because the CONSTELLATION was in the shipyard undergoing an overhaul at the time of the nonjudicial punishment, the vessel exception did not apply. The defense argued that under *Yatchak* and *Lorance*, "an aircraft carrier in a shipyard is not in operational status, and therefore an individual is not considered attached to or embarked on a vessel."[124] The military judge overruled the defense objection and admitted the record of nonjudicial punishment into evidence.[125]

On appeal before the Navy-Marine Corps Court of Military Review, the defense argued that *Yatchak*'s construction of the phrase "attached to or embarked in a vessel" should govern both confinement on bread and water and the right to refuse nonjudicial punishment.[126] The defense maintained that a crewmember of a ship undergoing a long-term overhaul should have the same

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[121] Record at 15; Prosecution Exhibit 1, United States v. Gilbert, No. 93-0019 (N.M.C.M.R. Feb. 9, 1994) (per curiam) [hereinafter Gilbert Record]. Gilbert's nonjudicial punishment consisted of confinement on bread and water for three days. *Id.* at Prosecution Exhibit 1.

[122] The USS CONSTELLATION entered the Service Life Extension Program at the Philadelphia Naval Shipyard in April 1990. *Carrier Comes to Shipyard*, PHILADELPHIA INQUIRER, Apr. 12, 1990, at 1. The overhaul was scheduled to last 29 months. *Id.* On November 6, 1992, the CONSTELLATION left the shipyard for a 10-day sea trial. *Carrier Starts Sea Trial*, L.A. TIMES, Nov. 7, 1992, at A13.

[123] Gilbert Record, *supra* note 121, at 15-16. For a discussion of *Booker* warnings, see *supra* note 98.

[124] Gilbert Record, *supra* note 121, at 15. The trial counsel replied that *Yatchak* and *Lorance* could be distinguished because those cases involved courts-martial conducted ashore and confinement on bread and water served in the naval station's brig; Seaman Gilbert, on the other hand, received nonjudicial punishment aboard the ship. *Id.* at 16.

[125] *Id.* at 17.

[126] Brief for Appellant at 5-7, United States v. Gilbert, No. 93-0019 (N.M.C.M.R. Feb. 9, 1994) (per curiam).

nonjudicial punishment refusal right as a Sailor assigned to the shipyard where the overhaul is performed.[127]

The Navy-Marine Corps Appellate Government Division responded by conceding that "at the time of the nonjudicial punishment in question," the CONSTELLATION "was not a 'vessel' for purposes of U.C.M.J., Article 15, because it was in a non-operational status as part of a long-term overhaul in a domestic shipyard."[128] The Appellate Government Division argued, however, that a ship does not lose its status as a vessel merely because it is undergoing a long-term overhaul. Rather, according to the Appellate Government Division, the ship's operability is the key. The government's brief suggested, "The line of demarcation in determining whether a ship engaged in a long-term overhaul in a domestic shipyard is a vessel for purposes of Article 15(a) should be its operational readiness capability — most importantly, is the ship navigably potent or capable of being navigably potent?"[129]

In an unpublished opinion, the Navy-Marine Corps Court of Military Review concluded that "[a]s the Government conceded, the military judge erred" by admitting the record of nonjudicial punishment into evidence.[130] At first

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[127] *Id.* at 6.

[128] Government Brief at 5, United States v. Gilbert, No. 93-0019 (N.M.C.M.R. Feb. 9, 1994) (per curiam) (internal citation omitted).

[129] *Id.* at 12.

[130] *Gilbert*, slip op. at 1 (No. 93-0019). The Navy-Marine Corps Court's internal rules provide that a decision will usually be reported if it "[e]stablishes, alters, modifies, or clarifies a rule of law." N.M.C.M.R. INTERNAL RULES AND OPERATING PROCEDURES 10-3a. Under this criterion, the *Gilbert* opinion would appear to be worthy of publication. However, the opinion provided no analysis of the nonjudicial punishment refusal right issue beyond noting that the Appellate Government Division had conceded that the military judge erred. The court's entire treatment of the issue appeared in two brief paragraphs:

> As the Government concedes, the military judge erred when she admitt[ed] into evidence over the objection of the defense counsel a record of nonjudicial punishment, Prosecution Exhibit 1. That record proved that the appellant received nonjudicial punishment on 14 November 1991 for unauthorized absence from his unit from on or about 3 September 1991 to on or about 28 October 1991.
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> . . . .
>
> The Government has requested that we hold that a record of nonjudicial punishment which reflects that it was conducted aboard a United States Navy ship or other watercraft in the service of the United States Navy, or while the accused was a member of the crew of such ship or watercraft, is *prima facie* evidence that the accused was "attached to or embarked in a vessel" for the purpose of Article 15, Uniform Code of Military Justice, 10

blush, *Gilbert* would appear to be an important case. After eighteen years of judicial decisions expansively construing the vessel exception, an appellate court had finally vindicated a crewmember's refusal right. But as an unpublished opinion, *Gilbert*'s value is negligible, both because it is not generally available and because of its limited precedential effect.[131] The *Gilbert* opinion's insignificance was demonstrated the following year by the Navy-Marine Corps Court of Criminal Appeals' decision in *United States v. Edwards*.[132] Like *Gilbert*, *Edwards* considered the admissibility of a record of nonjudicial punishment imposed upon a crewmember of a ship undergoing a long-term overhaul. *Edwards*, however, reached a result directly at odds with *Gilbert*, concluding that the vessel exception applies to a ship even while it is in dry dock for a long-term overhaul.[133] Despite discussions of *Gilbert* in both the

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U.S.C. § 815. We need not consider issues raised by the Government's request to resolve the case at bar. Thus, for reasons not relevant to the appellant's case, we choose not to squarely confront in this case the issues raised by the Government's request (i.e., We defer to another day action on such a request).

Gilbert, slip op. at 2, 3 (No. 93-0019).

[131] *See* N.M.C.M.R. INTERNAL RULES AND OPERATING PROCEDURES 10-4 (providing that "[i]n the absence of unusual circumstances, this Court will not cite an unpublished opinion . . . in any of its published opinions or unpublished dispositions" and providing that while counsel's citation to unpublished opinions is "disfavored," counsel may nevertheless cite "an unpublished disposition [that] has persuasive value in relation to a material issue in a case" if "there is no published opinion that would serve as well.").

[132] 43 M.J. 619 (N.M. Ct. Crim. App. 1995), *petition granted*, 44 M.J. 65 (1996). *Edwards* was not the first post-*Gilbert* opinion to consider the vessel exception's scope. In *United States v. Berry*, No. 93-02332 (N.M.C.M.R. Feb. 11, 1994) (per curiam), the appellant also contested the admissibility of a record of nonjudicial punishment where the mast had been held while the appellant's ship was undergoing a long-term overhaul. Even though the government conceded that the appellant's ship was not a vessel for purposes of the nonjudicial punishment refusal right and that the exhibit was inadmissible, the Navy-Marine Corps Court held that the issue was waived by the defense's failure to object to the exhibit at trial. *Id.*, slip op. at 3. Finding that the admission of the document "was not 'plain error' in that the error was neither obvious or substantial nor unfairly prejudicial," the court rejected the government's concession and denied the appellant any relief. *Id.* Even though the *Berry* decision was announced just two days after the *Gilbert* opinion, *Berry* did not cite *Gilbert*. The three-judge panels that decided the two cases were entirely different.

[133] While none of the judges on the *Edwards* panel sat on *Gilbert*, one of the *Edwards* panel's judges did sit on the *Berry* panel. United States v. Berry, No. 93-02332, slip op. at 1 (N.M.C.M.R. Feb. 11, 1994) (per curiam); *see supra* note 132 (discussing *Berry*).

appellant's and the government's briefs,[134] and despite its own order granting the appellant's motion to attach a copy of the *Gilbert* opinion to the *Edwards* record,[135] the *Edwards* panel totally ignored *Gilbert*. At one point, *Edwards* expressly observes, "There are no reported decisions that have applied the *Yatchak* rationale to the imposition of nonjudicial punishment."[136] The opinion fails to acknowledge that an unpublished decision had implicitly done exactly that.

In *Edwards*, following the accused's conviction of unauthorized absence, the government introduced a record of nonjudicial punishment during its case in aggravation.[137] The defense objected to the record's admission, arguing that because the USS CONSTELLATION[138] was undergoing a long-term overhaul at the time of the mast, the vessel exception did not apply.[139] The military judge overruled the objection, holding that *Yatchak* applied only to the punishment of confinement on bread and water, and not to the nonjudicial punishment refusal right.[140]

On appeal before the Navy-Marine Corps Court, the defense challenged the military judge's ruling, arguing that *Yatchak* extended the right to refuse nonjudicial punishment to crewmembers whose ships are undergoing long-term overhauls. While conceding that *Yatchak* applies to vessel exception determinations, the government offered a detailed six-factor analysis for determining whether a ship undergoing an overhaul is in an "operational status":

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[134] Brief for Appellant at 7 n.5, United States v. Edwards, 43 M.J. 619 (N.M. Ct. Crim. App. 1995) (No. 94-00085); Government Brief at 17 n.4, United States v. Edwards, 43 M.J. 619 (N.M. Ct. Crim. App. 1995) (No. 94-00085).

[135] United States v. Edwards, No. 94-00085 (N.M.C.M.R. Aug. 3, 1994) (order granting motion for leave to attach document).

[136] 43 M.J. at 622.

[137] *Id.* at 620. The nonjudicial punishment was for an unauthorized absence of 16 hours and carrying two concealed weapons. *Id.*

[138] Coincidentally, the USS CONSTELLATION was the same ship at issue in *Gilbert*. *See supra* notes 121-22 and accompanying text.

[139] 43 M.J. at 621-22.

[140] *Id.* at 622.

(1) Whether or not the nucleus crew is berthed aboard the ship in a self-sustaining residence status;
(2) Whether or not the nucleus crew is messed aboard the ship;
(3) Whether or not the nucleus crew is standing watches aboard the ship;
(4) Whether or not the ship's equipment is operable;
(5) Whether or not the ship is capable of navigation, and;
(6) Whether or not the ship is capable of getting underway (that is, is the ship capable of going out on the water whether under its own propulsion or by tow).[141]

This list of factors is not perfect. It makes little sense to classify an aircraft carrier as "operational" merely because it can be towed out to sea, even if it is still sitting in a dry dock, incapable of reaching speeds necessary to launch and recover aircraft. Similarly, it makes little sense to consider a submarine "operational" merely because it can be towed out to sea, even if it is still sitting in a drydock, incapable of submerging. A better rule would be that the vessel exception does not apply to a ship undergoing a long-term overhaul[142] until the ship *actually* goes to sea, whether under its own power or under tow.[143] While the Appellate Government Division's list of operability factors requires some revision, it provides a useful starting point for determining

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[141] Government Brief at 17, United States v. Edwards, 43 M.J. 619 (N.M. Ct. Crim. App. 1995) (No. 94-00085).

[142] One commentator has suggested that going into drydock for repairs that require longer than six weeks to complete should remove a ship's crew from the vessel exception. Salisbury, *supra* note 3, at 875. He explained:

> If a ship is in a yard for repairs that take more than six weeks, all ammunition must be offloaded. DEP'T OF THE NAVY, AMMUNITION AFLOAT, para. 2-53B (1979) (NAVSEA OP 4, Vol. 2, fifth rev.). The repairs, routinely accomplished by civilian workers, are so extensive that they cannot be safely made without dismantling the ship's war-making plant. Of course a ship torn apart in this manner is incapable of performing a military mission. The military necessity argument for denying a sailor the right to [demand a] court-martial [in lieu of nonjudicial punishment] in such circumstances is therefore unpersuasive.

Id. at 875 n.201.

[143] Placing the focus on a ship actually going to sea rather than its capability to do so would resolve the issue of whether the vessel exception applies to an underway ship rendered inoperable as a result of severe weather, accidental grounding, collision, or combat. *See Edwards*, 43 M.J. at 624 (noting that such events "could render a ship not 'operational'"). Until the ship returns to a port, the vessel exception would continue to apply because the ship would remain at sea.

when the vessel exception should apply. Nevertheless, the Navy-Marine Corps Court's opinion rejected both the government's and the defense's arguments.

The *Edwards* opinion's refusal to consider the ship's operational status is inconsistent with controlling precedent. *Edwards* opined that "a naval ship undergoing overhaul is a vessel at all times without regard to its operational status until a determination is made to the contrary by competent authority."[144] This proposition, however, conflicts with the Court of Military Appeals' *Yatchak* decision. In *Yatchak*, Judge Gierke's majority opinion framed the "fundamental question" in the case as "whether appellant was 'attached to or embarked in a vessel.'"[145] The court answered that question by holding that "appellant was not 'attached to or embarked in a vessel' as that phrase was used by Congress."[146] The court specifically noted that "[a]t the time of his court-martial, appellant was assigned to the crew of the USS KITTY HAWK."[147] Thus, *Yatchak* conclusively establishes that assignment to a commissioned vessel does not automatically make a servicemember "attached to or embarked in a vessel."

Edwards attempted to escape from *Yatchak*'s rationale. *Edwards* argued that *Yatchak* "does not impose a clear and unequivocal legal requirement to judicially mandate a sweeping change to Navy policy concerning the imposition of nonjudicial punishment under Article 15, UCMJ."[148] According to *Edwards*, "the major focus of the [*Yatchak*] decision was on 'congressional concerns about the punishment of confinement on bread and water' and only incidently, if at all, the operational status of the vessel."[149] *Edwards*'s characterization of *Yatchak*, however, conflicts with the *Yatchak* majority's

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[144] 43 M.J. at 624-25. According to *Edwards*, such "competent authorit[ies]" are the Secretary of the Navy and the Chief of Naval Operations, to whom "law and regulations applicable to classification of naval vessels" give the authority to determine "the status of a vessel." *Id.* at 624.

[145] United States v. Yatchak, 35 M.J. 379, 380 (C.M.A. 1992).

[146] *Id.* at 381. *See also* United States v. Lorance, 35 M.J. 382, 384 (C.M.A. 1992) (noting that "appellant was not attached to or embarked in a vessel").

[147] *Yatchak*, 35 M.J. at 380. *See also Lorance*, 35 M.J. at 383 (observing that at the time of his court-martial, Lorance was assigned to the USS KITTY HAWK's crew).

[148] *Edwards*, 43 M.J. at 624.

[149] *Id.* 624 (quoting *Yatchak*, 43 M.J. at 381).

assertion that the "fundamental question in this case is whether appellant was 'attached to or embarked in a vessel.'"[150]

Logic suggests that servicemembers who are not attached to a vessel for purposes of confinement on bread and water are also not attached to a vessel for purposes of the right to refuse nonjudicial punishment. To hold otherwise, the phrase "attached to or embarked in a vessel" in Part IV of the 1984 Manual for Courts-Martial[151] would *exclude* crewmembers of ships undergoing long-term overhaul, while the exact same phrase in Part V of the Manual[152] would *include* crewmembers of ships undergoing long-term overhaul. Such a construction would violate fundamental canons of statutory interpretation.[153] A basic rule of statutory construction provides that "all parts of a statute should . . . be construed together."[154] This rule applies even if one of the statutory provisions has been repealed.[155] Thus, the phrase "attached to or embarked in a vessel" in Part V of the Manual should be given the same construction as the same phrase that appeared in the original R.C.M. 1003(b)(9).

A second basic canon of statutory construction supports this conclusion as well. The rule of *in pari materia* provides that where two statutes deal with the same subject matter, they should be construed together.[156] A 1983 Opinion of the Judge Advocate General of the Navy found that "it appears Congress intended the *same* vessel exception to apply, whether the right to refuse nonjudicial punishment was involved, or the punishment of confinement

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[150] *Yatchak*, 35 M.J. at 380.

[151] 1994 MCM, *supra* note 112, R.C.M. 1003(b)(9), removed by Exec. Order 12960, 60 Fed. Reg. 26,647 (1995), *reprinted in* 1995 MCM, *supra* note 4, app. 25, at A25-26.

[152] 1995 MCM, *supra* note 4, pt. V, ¶3.

[153] While the Manual for Courts-Martial is a regulation, the Court of Military Appeals has held that it is to be interpreted according to rules of statutory construction. United States v. Lucas, 1 C.M.A. 19, 22, 1 C.M.R. 19, 22 (1951).

[154] NORMAN J. SINGER, 2B STATUTES AND STATUTORY CONSTRUCTION § 51-03, at 117-18 (5th ed. 1992).

[155] *Id.* at § 51.04, at 172 ("An act relating to the same subject matter need not be a valid and existing statute to be construed with an ambiguous act in order to help determine its meaning.").

[156] SINGER, *supra* note 154, at § 5.03, at 117. The Court of Military Appeals has held that statutes dealing "with the same general subject matter . . . should and must be construed in *pari materia*." United States v. Marsh, 13 C.M.A. 252, 258, 32 C.M.R. 252, 258 (1962).

on bread and water was at issue."[157] Confinement on bread and water and the vessel exception therefore should be considered *in pari materia*. Under a corollary to the *in pari materia* principle, "an amendment and the unchanged portion of the original act should be construed together."[158] This corollary applies with particular force where "a word is used more than once in the same section."[159] Accordingly, the phrase "attached to or embarked in a vessel" as used in the 1962 amendment to Article 15(a) should be interpreted consistently with the same phrase in article 15(b). *Yatchak* holds that the latter provision does not apply to a ship undergoing a long-term overhaul if that ship is not operational. Under the *in pari materia* principle and its corollary, the former provision is similarly inapplicable to a ship rendered inoperable by a long-term overhaul.

Edwards also offered a second basis for rejecting the argument that a ship's operational status should govern nonjudicial punishment refusal rights. The opinion initially noted that *Yatchak* did not address "the legal significance, if any, of the 'operational status' of a Navy ship."[160] The court observed that it was unaware of: (1) any "generally accepted definition of the term 'operational' as applied to United States Navy ships";[161] (2) "any sort of established procedure for administratively determining the operational status of naval vessels to which the parties may look for guidance;"[162] or (3) "any

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[157] Status of Floating Drydocks as Vessels within the Meaning of Article 15 of the Uniform Code of Military Justice, Op. JAG, Navy, JAG:202.1:WTC:bh Ser:202.1/37041 (1 Jun 1983), at encl(1) 14 (on file with Office of the Assistant Judge Advocate General, Criminal Law (Code 20), Washington, D.C.).

[158] SINGER, *supra* note 154, at § 5.03, at 118.

[159] *Id.* at § 5.03, at 122 (quoting Commissioner v. Estate of Ridgway, 291 F.2d 257, 259 (3d Cir. 1961)).

[160] United States v. Edwards, 43 M.J. 619, 623 (N.M. Ct. Crim. App. 1995).

[161] *Id.* The court noted that "[t]here is, however, an official list of the 'Operating Forces of the Navy' published in Part 1 of the Standard Navy Distribution List, Office of the Chief of Naval Operations, NO9B22, 2000 Navy Pentagon, Washington, D.C. 20350-2000." *Id.* at 623 n.5.

[162] *Id.* at 623. The court also noted:
There is a NAVAL VESSEL REGISTER/SHIPS DATA BOOK published by the Naval Sea Systems Command, Department of the Navy, Washington, D.C. 20362. Chapter 663 of the U.S.Code, Naval Vessels, contains several provisions relating to the classification, examination for fitness, and striking from the Naval Vessel Register of vessels of the U.S. Navy. An earlier version of 10 U.S.C. § 7304 provided that a vessel unfit for service, or

authoritative reference materials that would provide the parties in litigation a framework for legal analysis."[163] The court added, "We do not favor a rule of law that creates uncertainty and is likely to result in extensive litigation and inconsistent decisions."[164] Rather than concentrating on "operational status," which the court viewed as vague, the court chose to emphasize the word "vessel," which the court believed had a fixed meaning.[165]

The *Edwards* court's concern over difficulty in defining "operational status" rings hollow. Courts constantly face the task of construing terms with no fixed definition. As Judge Calabresi wrote in his classic work on statutory construction, "[I]nterpretation of statutes involves an almost unavoidable judicial task. Words do not interpret themselves. . . . [C]ourts have been the

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"an unfinished vessel in any naval shipyard that cannot be finished without disproportionate expense," shall be stricken from the Register by the Secretary of the Navy. 10 U.S.C. § 7304 (1988). The current version still refers to "unfinished vessels."
Edwards, 43 M.J. at 623 n.6.

[163] *Edwards*, 43 M.J. at 623.

[164] *Id.* The court's stated aversion to "inconsistent decisions" is ironic in that *Edwards* itself was inconsistent with the earlier holding in *Gilbert*.

[165] *Edwards*, 43 M.J. at 624. The court opined:
The term "operational status," is undefined and has no statutory or regulatory basis to be used in deciding whether a U.S. Navy ship is a "vessel" within the meaning of Article 15, UCMJ. In contrast, the term "vessel" is defined in the U.S.Code and that definition is prima facie evidence of the intent of Congress as to the meaning of the term in Article 15, UCMJ. Finally, the Navy's interpretation of the term "vessel" is entitled to substantial deference unless manifestly contrary to the intent of Congress. *Cf. Davis v. United States*, 495 U.S. 472, 484, 110 S.Ct. 2014, 2021, 109 L.Ed.2d 457 (1990) (holding that an agency's interpretation and practices are given considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.)

Congress has provided a statutory definition of the term "vessel" and entrusted the responsibility for making determinations regarding it to those who it believed would be best qualified and in the best position to obtain and evaluate information necessary for the administration of statutory and regulatory provisions concerning the classification of naval vessels. See 10 U.S.C. § 7304 (1988); U.S. Navy Regulations, art. 0406. The need for not only extended overhauls, but circumstances such as a casualty at sea due to severe weather, accidental grounding or collision—not to mention damage caused by enemy action in time of war—could render a ship not "operational" for disciplinary purposes. Nothing in the legislative history suggests to us that Congress meant to alter the responsibility for command of a vessel in such a manner.
Edwards, 43 M.J. at 624.

instrument selected to explain what legislative words mean."[166] The Navy-Marine Corps Appellate Government Division had assisted the process of defining the phrase by offering a plausible, albeit imperfect, method for determining a ship's operational status.[167] However, *Edwards* rejected the government's invitation to adopt its analytical framework, and instead chastised the government for not issuing a regulation prescribing when servicemembers attached to or embarked in vessels may refuse nonjudicial punishment.[168] While the Secretary of the Navy could adopt such a regulation, this executive authority does not absolve the Navy-Marine Corps Court of its duty to construe the existing UCMJ and Manual for Courts-Martial provisions; after all, it is "emphatically the province and duty of the judicial department to say what the law is."[169] Had the Navy-Marine Corps Court applied the proper rules to determine "what the law is," the court would have held that the vessel exception does not apply to a ship rendered inoperable during a long-term overhaul.

Finally, *Edwards* erred by concentrating exclusively on the word "vessel." Rather than focusing on a precise definition for that word, the Court of Military Appeals has treated the phrase "attached to or embarked in a vessel" as a unitary term of art. In a 1991 Court of Military Appeals decision dealing with a ship being overhauled, Senior Judge Everett's concurring opinion suggested that "regardless of Naval regulations and personnel accounting," a crewmember "was not 'attached to'" the ship "within the meaning of Article 15 or RCM 1003(b)(9)—which contemplates vessels at sea or about to go to sea."[170] In *Yatchak*, Judge Gierke's majority opinion noted, "The legislative

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[166] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31 (1982).

[167] *See supra* note 141 and accompanying text.

[168] *Edwards*, 43 M.J. at 623. The court noted:

> No regulations have been issued providing guidance to commanding officers and servicemembers as to when a servicemember attached to or embarked in a vessel may refuse NJP. Such regulations are expressly authorized and would presumably prevent a servicemember from suffering a punishment his or her commanding officer could not lawfully impose without the member's consent rather than placing the burden on the servicemember to suffer the punishment and attempt later to prove it was unlawful. *See* Article 15(a), UCMJ. We find the absence of such a regulation inexplicable in light of the Government's position in this appeal.

Id.

[169] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[170] United States v. Valead, 32 M.J. 122, 127-28 (C.M.A. 1991) (Everett, S.J., concurring in the result).

history supports Senior Judge Everett's tentative interpretation of the term, since it reflects that Congress devised the term, 'attached to or embarked in a vessel,' to cover those actually at sea as well as those in port when their ship is about to depart.'"[171] *Yatchak* ultimately held that "appellant was not 'attached to or embarked in a vessel,' as that phrase was used by Congress."[172] Thus, *Edwards* was wrong to focus on the word "vessel." Instead, the opinion should have followed the Court of Military Appeals' interpretation of the phrase "attached to or embarked in a vessel."

By failing to apply basic canons of statutory construction, *Edwards* reached an incorrect result. The Court of Appeals for the Armed Forces has decided to review *Edwards*.[173] If that court reverses the Navy-Marine Corps Court's decision, the opinion will be the first reported case ever to limit the vessel exception's application.

V. A PROPOSAL FOR REFORM

Thirty-four years have passed since Congress adopted the vessel exception. In that time, one of Congress's key justifications for enacting the vessel exception has vanished. In adopting the vessel exception, Congress pointed to a servicemember's inability to refuse summary court-martial if the servicemember had already refused nonjudicial punishment.[174] Congress chose not to create a system where refusing nonjudicial punishment would remove the case from the commanding officer only to put the case in the hands of one of the commanding officer's subordinates. The Military Justice Act of 1968, however, gave servicemembers the right to refuse summary court-martial even if they had already refused nonjudicial punishment.[175] Now, rather than going

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[171] United States v. Yatchak, 35 M.J. 379, 381 (C.M.A. 1992).

[172] *Id.*

[173] United States v. Edwards, 44 M.J. 65 (1996) (order granting review). The Court of Appeals for the Armed Forces granted review of "[w]hether the lower court erred in determining that the operational status of a naval vessel was irrelevant for the purpose of imposing nonjudicial punishment under Article 15." *Id.*

[174] *See supra* note 60 and accompanying text.

[175] Military Justice Act of 1968, P.L. 90-632, § 2(6), 82 Stat. 1336 (1968). The same act created the position of military judge, and changed the services' boards of review into Courts of Military Review.

from a hearing before the commanding officer to a hearing before the commanding officer's subordinate, the servicemember who refuses nonjudicial punishment can move from a hearing before the commanding officer to a judicial forum. Yet even after one of the vessel exception's foundations crumbled, the courts have constricted the right to refuse nonjudicial punishment. Throughout the 1970s, the judiciary construed the vessel exception broadly, even applying it to a submarine's crewmembers who were nonjudicially punished during a six-month period ashore.[176]

The Navy-Marine Corps Court of Military Review finally imposed a limitation on the vessel exception in 1994. The court recognized that a crewmember of a ship rendered inoperable by a long-term overhaul has the right to refuse nonjudicial punishment. But that unreported decision, as well as the Navy-Marine Corps Appellate Government Division's concession that preceded it, proved to be as ephemeral as the Schlei Memorandum. Without even acknowledging its own inconsistent precedent, in 1995 the Navy-Marine Corps Court applied the vessel exception to a ship undergoing a 31-month overhaul. The Court of Appeals for the Armed Forces now has an opportunity to correct this overly expansive interpretation of the vessel exception. Even if the court were to overrule *Edwards*, however, the right to refuse nonjudicial punishment will continue to be far more restricted than originally intended, and far more restricted than necessary to promote shipboard discipline.

The current expansive scope of the vessel exception violates the armed services' agreement memorialized in the Schlei Memorandum. That agreement does not have the force of law, and it would be improper for the judiciary to attempt to enforce the Schlei Memorandum's limitations on the vessel exception. The Executive Branch and Congress, on the other hand, are free to expand the right to refuse nonjudicial punishment. Article 15(a) authorizes either the President or the Service Secretaries to adopt regulations limiting the vessel exception.[177] To ensure uniform policies in today's joint operational environment,[178] limitations on the vessel exception should be imposed by presidential regulations. Thus, the appropriate vehicle for regulatory amendment is paragraph 3 of Part V of the Manual for Courts-Martial.

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[176] *See supra* notes 88-93 (discussing Bennett v. Tarquin, 466 F. Supp. 257 (D. Haw. 1979)).

[177] UCMJ art. 15(a) (1994).

[178] *See supra* notes 12-14 and accompanying text.

An amendment to the Manual's nonjudicial punishment provisions should begin by limiting the vessel exception to nonjudicial punishment hearings that actually occur aboard a vessel. Regardless of whether a servicemember is assigned to a ship, the vessel exception should not apply when nonjudicial punishment is imposed ashore. This limitation would comport with Congress' original understanding of the vessel exception. The vessel exception arose from the Senate Armed Services Committee's consideration of the 1962 nonjudicial punishment amendments. The committee's report on those amendments used the phrase "aboard ship" three times to characterize the vessel exception's scope.[179] During the amendments' floor debate, Senate Armed Services Committee Chairman Russell provided an even narrower interpretation of the vessel exception, explaining that the right to refuse nonjudicial punishment would apply except "in some cases where a ship is at sea."[180] Applying the vessel exception to servicemembers ashore—even if they happen to be members of a ship's crew—is simply inconsistent with Article 15(a)'s legislative history. A Senator who voted on the bill after reading the Armed Services Committee report or listening to Senator Russell's explanation never would have expected the vessel exception to apply to a submarine's "off" crew. When the nonjudicial punishment proceeding is held ashore, the peculiarities of shipboard service that led Congress to adopt the vessel exception are absent.

The same rationale applies where a nonjudicial punishment proceeding is held aboard an *inoperable* vessel in a shipyard or port. As the Navy-Marine Corps Appellate Government Division has conceded, the vessel exception should not apply to a ship rendered inoperable by a long-term overhaul.[181] Thus, regulatory reform of the vessel exception should also provide a refusal right to crewmembers of inoperable ships. There should be an exception to this refusal right, however, for inoperable vessels at sea. If a ship at sea is rendered inoperable as the result of combat operations, severe weather, accident, or any other cause, the peculiarities of shipboard conditions that led Congress to adopt the vessel exception continue until the ship returns to port. An inoperable vessel at sea should therefore continue to qualify for the vessel exception.

Another needed reform concerns commands' attempts to evade judicial rulings by dismissing charges from a court-martial and imposing nonjudicial

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[179] SENATE NJP REPORT, *supra* note 10, at 1-2. For the report's language, see *supra* text accompanying note 60.

[180] 108 CONG. REC. 17,560 (1962) (statement of Senator Russell).

[181] *See supra* note 141 and accompanying text.

punishment upon the accused. Experience has demonstrated that the vessel exception is susceptible to such abuse. As Chief Judge Everett has noted, by referring charges to a court-martial, the command "negate[s] the very premise on which [the vessel] exception rests—namely, that, by reason of the necessities of seafaring operations, it takes too much time and effort to try by court-martial 'minor offenses' committed by shipboard personnel."[182] This avenue for abuse could be easily closed by providing that once charges have been referred to a court-martial, the vessel exception no longer applies to those charges. If charges are dismissed—whether by the military judge or the convening authority—and the same alleged misconduct becomes the subject of a nonjudicial punishment hearing, the servicemember would have the right to refuse.

These modest revisions would cure most of the ills that have arisen from the vessel exception's application. However, even if these limitations were adopted, one avenue for abuse would still be open: servicemembers' nonjudicial punishment refusal rights could be defeated simply by ordering them to temporary duty aboard a vessel.[183] The Schlei Memorandum provides the solution to this potential problem. Reviving and codifying the military services' agreement with the Justice Department would limit the vessel exception to alleged misconduct that occurs aboard a ship or in the process of boarding a ship, and to alleged unauthorized absence in an overseas port. This rule may sometimes inconvenience shipboard commands. For example, a command might not learn of an offense committed ashore until after the ship is underway. In such a case, the Schlei Memorandum's criteria would allow the suspected servicemember to refuse nonjudicial punishment. Despite such possible inconvenience, the Navy found the Schlei Memorandum's criteria acceptable in 1963, and presumably operated under them for some time until they fell into disuse. If these restrictions were acceptable to the Navy in 1963, they should be no less acceptable to the Navy today, when advances in transportation and communications technology would likely diminish the impact of an expanded refusal right.[184]

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[182] Dobzynski v. Green, 16 M.J. 84, 89 (C.M.A. 1983) (Everett, C.J, dissenting).

[183] Chief Judge Everett's *Jones* dissent noted the possibility of attaching servicemembers to ships for temporary duty in order to overcome their nonjudicial punishment refusal rights. Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet, 18 M.J. 198, 202 (C.M.A. 1984) (Everett, C.J., dissenting).

[184] The Navy Judge Advocate General's Corps has committed itself to ensuring "that our military justice services maintain expeditionary capability to provide quality, responsive, comprehensive military justice services whenever and wherever needed." OFFICE OF THE JUDGE ADVOCATE GENERAL, LEADERSHIP IN LEGAL SERVICES: THE NAVY-MARINE CORPS LEGAL COMMUNITY IN

These proposed limitations on the vessel exception would not endanger military readiness or discipline. Before 1963, all Army and Air Force personnel had the right to refuse nonjudicial punishment. Since 1963, all servicemembers who are not attached to or embarked in vessels have had the right to refuse nonjudicial punishment. Tank battalions, aviation squadrons, and entire infantry divisions have managed to cope without the vessel exception. Servicemembers on the ground have the right to refuse nonjudicial punishment *even in combat*. The vessel exception is simply not the linchpin of military discipline.

Officers aboard ships will be equally effective as their land-based counterparts in finding suitable means to enforce discipline.[185] One option available to the command is to refer charges to a special court-martial when a servicemember refuses nonjudicial punishment. Experience suggests that resort to a special court-martial will be just as effective for shipboard commands as it is for commands ashore. As one commentator who favored limiting the vessel exception noted, shipboard commands have proven quite able "to convene courts when the captain of the ship decides that *he*, rather than the accused, wants a trial."[186] A survey of Navy special courts-martial supports this point. Of the first 100 Navy special court-martial cases[187] docketed with the Navy-Marine Corps Court of Criminal Appeals in 1995, 48 were convened by a ship's

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THE 21ST CENTURY 11 (1996). One means toward this end is increased use of videoteleconferencing. The Navy-Marine Corps Legal Community's strategic plan provides, "Remote videoteleconferencing will be used routinely across a wide spectrum of processes, such as training, client and witness interviews, legal readiness screening, administrative boards, and courts-martial." *Id.* at 15.

[185] Naval historian James E. Valle notes that major changes to the naval justice system "have been forced upon the navy from without. Traditional opinion within the service has always held that each successive reform would bring ruin and collapse." JAMES E. VALLE, ROCKS & SHOALS 277 (1980). Nevertheless, "the [N]avy itself, after more or less uncomfortable periods of adjustment, has always been able to reconstitute its disciplinary system and survive the changes." *Id.* at 281.

[186] Salisbury, *supra* note 3, at 867. The comment recommended that once "[t]he captain of the vessel has established a courts-martial panel to try offenses at the option of the government," crewmembers of the ships should be entitled to refuse nonjudicial punishment. *Id.* at 875. The comment also recommended that the right to refuse nonjudicial punishment be extended to crewmembers of a vessel "in drydock for repairs that require six weeks or more to complete," and to crewmembers "of a submarine 'off' crew physically stationed ashore." *Id.* The comment proposed several additional limitations on nonjudicial punishment, including restricting nonjudicial punishment to offenses that would be misdemeanors under federal law and eliminating confinement on bread and water as an authorized nonjudicial punishment. *Id.* at 874-75.

[187] For purposes of this survey, a court-martial was considered a Navy case if it was convened by a Navy officer, regardless of whether the accused was a Sailor or Marine.

commanding officer.[188] This percentage mirrors exactly the percentage of Navy personnel stationed aboard ships.[189] Thus, in practice, the special court-martial is a viable disciplinary tool for shipboard commanding officers.[190]

Another tool equally available to shipboard and shore-based commands is the administrative discharge board, which may result in a servicemember's separation from the military with the stigma of an other-than-honorable discharge. Shipboard commands can also preserve good order and discipline through the use of nonpunitive measures, such as administrative withholding of privileges[191] or denying liberty in foreign ports.[192] Even without the vessel exception, ships' commanding officers possess the necessary tools to maintain control and accomplish their missions.

One key reason why limiting the vessel exception would have little impact on good order and discipline is the infrequency with which the refusal

[188] One caveat should be noted when considering this result. Only special courts-martial in which the accused was found guilty and sentenced to a bad-conduct discharge are docketed with the Navy-Marine Corps Court. *See* UCMJ art. 66(b) (1994). Accordingly, the cases surveyed are not entirely representative of the total universe of Navy special courts-martial.

[189] As of December 1995, the Navy numbered 428,018 members, 204,139 of whom were assigned to vessels. Telephone Interview with Lieutenant Commander Kenneth Ross, U.S. Navy, Director of Media Information, Department of the Navy Office of Information (Dec. 29, 1995).

[190] In appropriate cases, commands could impose pretrial restraint upon shipboard servicemembers awaiting special court-martial. *See generally* 1995 MCM, *supra* note 4, R.C.M. 304.

[191] R.C.M. 306(c)(2) provides that permissible administrative "corrective measures" include "counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges." 1995 MCM, *supra* note 4, R.C.M. 306(c)(2). R.C.M. 306(c)(2)'s discussion adds that other administrative measures include adverse entries in "efficiency reports, academic reports, and other ratings; rehabilitation and reassignment; career field reclassification; administrative reduction for inefficiency; bar to reenlistment; personnel reliability program reclassification; security classification changes; pecuniary liability for negligence or misconduct; and administrative separation." *Id.* at R.C.M. 306(c)(2) (discussion). *See also* JAGMAN, *supra* note 6, at 0102-0105 (providing guidance on the use of extra military instruction, administrative withholding of privileges, and nonpunitive censure).

[192] *See* JAGMAN, *supra* note 6, at 0104b (authorizing "deprivation of normal liberty in a foreign country or in foreign territorial waters, when such action is deemed essential for the protection of the foreign relations of the United States, or as a result of international legal hold restriction").

right is actually invoked.[193] Just as Chief Judge Everett and Rear Admiral Mott noted in 1962,[194] servicemembers are reluctant to refuse nonjudicial punishment and risk the stiff punishments of a special court-martial. Nevertheless, an expanded refusal right would deter abuses and promote the fair use of nonjudicial punishment.[195]

VI. CONCLUSION

In early 1963, the Kennedy Administration found itself in a time crunch. While the Justice Department was dissatisfied with the broad scope of the proposed Manual for Courts-Martial provision establishing the vessel exception, the Administration did not have enough time to draft a new provision. The Justice Department attempted to escape from this deadline pressure by reaching an agreement with the military services to apply the vessel exception narrowly. However, that agreement eventually sank into obscurity, and only the broad language of the Manual for Courts-Martial provision remained. The result is that the vessel exception now covers a myriad of situations clearly beyond the vessel exception's intended scope. Members of Congress who voted on the 1962 legislation—as well as the Kennedy Administration officials who drafted the 1963 Manual for Courts-Martial changes—would be quite surprised to see the vessel exception applied to Sailors living in barracks at a Naval Station while their ship is in dry dock for 31 months, or to Sailors living in

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[193] "The vast majority of servicemembers decide it is in their best interests to accept nonjudicial punishment." 1 GILLIGAN & LEDERER, *supra* note 3, at § 8-26.11. *See, e.g.*, Dumas v. United States, 620 F.2d 247, 253 (Ct. Cl. 1980) (noting that "[u]pon the advice of counsel [the petitioners] elected Article 15 nonjudicial punishment to avoid the risk of greater penalties which could have been imposed by a court-martial"). Indeed, Chief Fletcher ultimately chose to accept nonjudicial punishment rather than pursue a writ whose success might have returned his case to a special court-martial. Fletcher v. Covington, 42 M.J. 116 (1995) (order granting petitioner's motion to dismiss petition for extraordinary relief); for a discussion of *Fletcher v. Covington*, see *supra* notes 7-9 and accompanying text.

[194] *Senate NJP Hearing*, *supra* note 37, at 396.

[195] *See* AIR FORCE NONJUDICIAL PUNISHMENT GUIDE, *supra* note 2, at para. 3.3, which provides:

> While no particular standard of proof applies to any phase of Article 15 proceedings, the commander should recognize that the alleged offender is entitled to demand trial by court-martial, in which case proof beyond a reasonable doubt by competent evidence is prerequisite to conviction and punishment. Therefore, the commander must consider whether such proof is available before initiating action under Article 15. If such proof is lacking, action under Article 15 is usually not warranted.

barracks at a submarine base while their submarine is on a six-month cruise without them.

In the decades that have passed since the Kennedy Administration adopted the Manual's vessel exception rule, the military justice system has seen occasional abuses of the nonjudicial punishment power. The broad construction of the vessel exception has left those servicemembers assigned to ships—currently including almost one-half of all active duty Navy personnel[196]—peculiarly susceptible to such abuses. Under the original understanding of the vessel exception's scope, however, the class of servicemembers to whom the vessel exception applied would have been far smaller, and far more logically connected to the vessel exception's underlying rationale—the unique disciplinary needs of a ship at sea.

Unless the vessel exception is limited, it will continue to produce absurd results. During the 31 months that the USS CONSTELLATION spent being overhauled in the Philadelphia Naval Shipyard,[197] American and allied forces carried out Operations Desert Shield and Desert Storm. Members of the armed forces fighting in the desert had the right to refuse nonjudicial punishment, yet the Sailors who remained in Philadelphia with the CONSTELLATION did not. A system that creates such irrational results is vulnerable if seriously scrutinized by Congress or the federal courts.[198] Unless it is reformed, the vessel exception could be lost entirely.

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[196] In December 1995, 48 percent of Navy personnel were assigned to ships. *See supra* note 189.

[197] *See supra* note 122 (discussing the USS CONSTELLATION's overhaul).

[198] Dicta in a recent Supreme Court decision indicates that the current vessel exception may have difficulty withstanding equal protection scrutiny. In *Romer v. Evans*, 116 S. Ct. 1620 (1996), the Supreme Court applied the rational basis standard to strike down a Colorado statute that prohibited jurisdictions within the state from adopting ordinances protecting homosexual rights. The Court indicated:

> Central to both the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remains open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Id. at 1628. On the other hand, federal courts may be reluctant to invalidate a congressional classification concerning military justice matters. In a 1981 opinion rejecting an equal protection challenge to the policy of limiting registration for possible conscription to men, the Supreme Court emphasized that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

The regulations governing the vessel exception—or Article 15 itself—should be amended to limit the vessel exception's scope. Such an amendment should restrict both the locations where the vessel exception applies and the alleged misconduct to which the exception will apply. First, the exception should apply only to nonjudicial punishments actually imposed on vessels at sea or on operable vessels in port. Second, the vessel exception should apply only to allegations of misconduct aboard a vessel at sea or an operable vessel in port, misconduct committed in the process of boarding an operable vessel, or unauthorized absence in an overseas port. Such an amendment should also grant servicemembers a right to refuse nonjudicial punishment if the same charges have been previously referred to a court-martial. A Manual for Courts-Martial provision adopting these changes would produce a substantial improvement in the military justice system's uniformity and fairness without sacrificing naval discipline.

APPENDIX A
JAN 29 1963
MEMORANDUM

Re: Proposed Executive order entitled, "Amending the Manual for Courts-Martial, United States, 1951, to implement section 815 of title 10, United States Code, relating to nonjudicial punishment."

This proposed Executive order was presented by the Secretary of the Air Force on behalf of the Department of Defense and has been forwarded for the consideration of this department by the Bureau of the Budget with the approval of the Director thereof.

Article 15 of the Uniform Code of Military Justice (10 U.S.C. 815) authorizes the imposition of nonjudicial punishment upon members of the armed forces for minor offenses. Such punishment is generally given in lieu of court-martial action. By Public Law 87-648 of September 7, 1962, Article 15 was amended, effective as of February 1, 1963, so as to authorize the armed serves to impose more severe nonjudicial punishments.

As in the case of other punishments authorized by the Uniform Code of Military Justice, the President is authorized to prescribe maximum punishments that are less severe than the maximum punishments authorized by statute, and is authorized to prescribe necessary regulations, limitations, and instructions concerning the administration of the Code.

This order amends the Manual for Courts-Martial so as to prescribe the new punishments, regulations, limitations, and instructions, necessitated by the recent amendment of Article 15.

An analysis and comparison of existing and proposed provisions of the Manual in this regard are contained in a letter from the Secretary of the Air Force transmitting the proposed order for the consideration of the Bureau of the Budget.

The maximum punishments authorized by the order are, in most instances, the same as the maximum established by Article 15. The one notable exception involves reduction in pay grade of enlisted men above pay grade E-4. Article 15 permits such enlisted men to be reduced two grades, but the order (Clause (iv), pages 11 and 12) permits them to be reduced only one grade except in time of war or in a national emergency hereafter proclaimed.

This distinction conforms to a recommendation made by the Senate Committee on the Armed Services (p. 4, Senate Report No. 1911, 87th Congress). The Committee considers reduction in grade of a high-ranking enlisted man during peacetime, when promotions are slow or nonexistent, to be an extremely harsh punishment and feels that two grade demotions of those enlisted men should be imposed only in wartime or in some future national emergency. However, to allow the President sufficient flexibility to cope with unforeseeable emergency situations, the Congress refrained from imposing a statutory one grade demotion limitation. In this regard, it should be noted that the Manual permits enlisted men above E-4 to be reduced no more than one grade by summary court-martial, despite statutory authority that permits reduction to the lowest enlisted grade.

The military services have been authorized to impose nonjudicial punishment for minor offenses for many years, but members of the Army and Air Force have always had the option of electing to be tried by courts-martial instead. By contrast, members of the Navy, Marine Corps, and Coast Guard have not been allowed such an option.

During consideration of the recent legislation, the Congress expressed the intent to give Navy, Marine Corps, and Coast Guard members the same right to elect to stand trial by courts-martial in lieu of nonjudicial punishment as Army and Air Force members have always had, except in the case of persons attached to or embarked in a vessel (pp. 1 and 2, S. Rept. No. 1911, 87th Congress). However, Article 15(a), which confers such an option upon members of all of the services, makes the vessel exception applicable not only to members of the Navy, Marine Corps, and Coast Guard, but also to members of the Army and Air Force.

The new paragraph 132 of the Manual of Courts-Martial proposed by this order (p. 23) prescribes regulations implementing that exception. It appears that the language of that paragraph could be construed to deny the right of election to members who are assigned to organizations which have received overseas travel orders even though those organizations are still at duty stations that are considerably removed from the vessel involved, and without regard to whether actual boarding of the vessel is planned for the immediate future (for example, an organization at a base 100 miles from the port involved, and scheduled for overseas shipment 30 days in the future). This would appear to be inconsistent with the congressional intent.

Representatives of the Air Force, on behalf of all the services, state that the military services have no intention of denying an election to any member pursuant to paragraph 132 unless he is either aboard vessel or unless he is in the

immediate vicinity of a vessel and is in the process of boarding. The only exception to that rule would involve the possible denial of election to members attached to vessels who are absent without authority in foreign ports.

Since this order should be issued by not later than February 1, 1963, the effective date of the new nonjudicial punishment provisions under Public Law 87-648, since the services feel that it would take considerable time to prepare a technically acceptable substitute for paragraph 132, and since the services have agreed to administer paragraph 132 in conformity with the above-described understanding, it seems preferable to accept 132 rather than risk complications that might arise if the order is not issued by February 1.

In order to avoid any misunderstanding concerning this matter, a copy of this memorandum is being transmitted to the Air Force representatives who have agreed to disseminate its contents to the other services.

The only remaining provision of the order that requires special consideration is paragraph 134(4) (p. 30) which deals with the vacating of suspended punishments.

Paragraph 134 deals, in part, with the vacating of orders suspending punishments. Subparagraph (4) of that paragraph provides that no formal hearing is required in such instances. However, the draft order submitted by the Bureau of the Budget provided that members would be informed of the reasons for actions vacating suspensions of sentences and provided that they would be allowed an opportunity to rebut any derogatory or adverse information, <u>if practicable</u>.

At the request of this department, the words "unless impracticable" were substituted for the words "if practicable." It is felt that this change clearly expresses an affirmative policy of notifying members of the reasons for adverse actions resulting in the vacating of suspensions of punishments and of providing the adversely affected member an opportunity to refute any derogatory information upon which such action is based, unless conditions preclude that procedure. This affirmative policy seems preferable to the apparent negative policy of the original draft.

The services agreed to that change and indicated that their acceptance thereof represented no real deviation from their originally intended procedure in this regard.

Subject to the above-described construction of paragraph 132, relating to the option to elect court-martial instead of nonjudicial punishment, the provisions of this proposed order are acceptable as to form and legality.

A copy of this memorandum is being transmitted to Major Alvarado of the Department of the Air Force for the guidance of the military services.

Norbert A. Schlei
Assistant Attorney General
Office of Legal Counsel

APPENDIX B

NAS:CFS:rsn
JAN 29 1963
The President,

The White House.

My dear Mr. President:

I am herewith transmitting a proposed Executive order entitled "Amending the Manual for Courts-Martial, United States, 1951, to implement section 815 of title 10, United States Code, relating to nonjudicial punishment." This proposed order was presented by the Department of the Air Force on behalf of the Department of Defense and has been forwarded for the consideration of this department by the Bureau of the Budget with the approval of the Director thereof.

The proposed Executive order is approved as to form and legality.

The amendments to the Manual for Courts-Martial made by this order are designed to implement the provisions of Article 15 of the Uniform Code of Military Justice (10 U.S.C. 815) as that article was amended by Public Law 87-648 of September 7, 1962. Inasmuch as Public Law 87-648 becomes effective on February 1, 1963, this order should be issued by that date.

Respectfully,
/s/
Norbert A. Schlei
Assistant Attorney General
Office of Legal Counsel

SPOUSAL BATTERING AS AGGRAVATED ASSAULT: A Proposal to Modify the UCMJ

Lieutenant Commander Peter A. Dutton, JAGC, USN[*]

I. INTRODUCTION

> Domestic violence affects people from every race, religion, ethnic, educational and socio-economic group. It is the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings, and rapes combined. The corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly . . . . Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves.
>
> Therefore, the legislature finds and determines that it is necessary to strengthen materially New York's statutes . . . by increasing penalties for acts of violence within the household.[1]

This article examines domestic violence as a serious problem in society from which the military is not immune. It addresses the aggravated nature of the physical and psychological injuries caused by spousal battering, and the long-lasting effects both on the victims and on children who witness spousal battering in the home. This article points out that Article 128 of the Uniform Code of Military Justice is inadequate as currently drafted to address the serious effects of this crime, and shows that aggravating factors are present in most domestic battering crimes which support elevating the offense to an aggravated assault. The article reviews civil protections and counseling opportunities already available to victims of domestic violence, but shows that, although important, they are inadequate to end the violence. A specific modification to Article 128

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[*] *Lieutenant Commander Dutton is on active duty in the Navy Judge Advocate General's Corps. He is currently stationed as an instructor at Naval Justice School.*

[1] N.Y. Fam. Ct. Act § 812 (McKinney 1995), Historical and Statutory Notes, Legislative Findings of L. 1994, c. 222 and L. 1994, c. 222, sec. 1, eff. Jan. 1 1995.

of the UCMJ is then proposed to elevate spousal battering to the level of an aggravated assault in order to more appropriately and effectively address this crime.

II. DOMESTIC VIOLENCE AS A PROBLEM OF SIGNIFICANCE IN SOCIETY AND THE MILITARY.

A. *Domestic Violence in Society*

Wife battering[2] is a long-standing black eye on the face of American culture.[3] With the very earliest migration of Europeans to North America came the English common law and its Rule of Thumb, which permitted a husband to beat his wife with a rod or stick no thicker than his thumb or small enough to pass through a wedding band.[4] The rule was justified as a necessary means for a man to control his wife, for whose actions he was legally responsible, and as a natural extension of the man's authority as head of the family.[5] Even the brutal assault of rape was a legal impossibility within the bounds of marriage; the law presumed the woman's consent when she gave her consent to marry.[6]

The problem persists. At least one report concluded that there are as many as six million battered women in the United States.[7] Stark indication of the level of domestic violence against women is provided in the 1992 FBI report of crime statistics, which reveals that 29% of all female murder victims nation-

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[2] Although women in relationships with men are sometimes the aggressors, the Department of Justice has estimated that approximately 95% of the victims of domestic violence are women. Bureau of Justice Statistics, U.S. Dep't. of Justice, Report to the Nation on Crime and Justice: The Data, Washington, DC (October 1983).

[3] Michael Freeman, *Le Vice Anglais? Wife-Battering in English and American Law*, 11 FAM. L. Q. 199 (1977).

[4] James Truss, *A Man's Right to Chastise His Wife: The Common Law Rule of Thumb*, 26 ST. MARY'S L.J. 1149, 1157 (1995)

[5] *Id.* at 1157.

[6] HOMER H. CLARK, JR. & CAROL GLOWINSKY, DOMESTIC RELATIONS, CASES AND PROBLEMS 688-89 (4th ed. 1990).

[7] Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 273 (1985); Jane O'Reilly, *Wife Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 23.

wide were killed by husbands or boyfriends,[8] but only 4% of all male murder victims were slain by their wives or girlfriends.[9]

Often the problem goes unrecognized, however, because of the ability of many batterers to present very different public and private personas.[10] Another reason some domestic battering remains hidden is that the peculiar psychological dynamics of domestic battering often lead women to hide the battering, rather than to report it.[11]

There is always a social cost. Battering is reported by the Surgeon General to be the single largest cause of injury to women, accounting for one out of every five hospital emergency room cases.[12] Half the homeless women and children in this country are reported to be fleeing domestic violence.[13] Batterers reportedly harass their victims while at work, either over the telephone or in person, causing an increased rate of job loss.[14] Battering and abuse

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[8] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MURDER IN FAMILIES 1 (1994)

[9] FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (1992); *See also, Close to Home: Violence Behind Closed Doors*, WASHINGTON POST, Nov 13, 1994, at C8 (reporting 44% of women murdered in this country killed by husband or boyfriend).

[10] Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 331-32. ANSON SHUPE, VIOLENT MEN, VIOLENT COUPLES: THE DYNAMICS OF DOMESTIC VIOLENCE 21 (1987) (describing cases of domestic violence by high level SEC officer and "Capitol Hill luminaries").

[11] *See Joan Zorza, Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929 (1994); *See also*, Shupe, *supra* note 10, at 29.

[12] Zorza, *supra* note 11, at 929 (citing McManus & Hightower, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269 (May/June 1989)).

[13] Zorza, *supra* note 11, at 959 n. 262 (citing *The Violence Against Women Act of 1990: Hearings on S. 2754, Before the Senate Comm. on the Judiciary*, Report 101-545, 101st Cong. 2d Sess., Report 101-545 (1990); Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421 (1991)).

[14] Zorza, *supra* note 11, at 929 (citing S. SCHECTER & L. GRAY, A FRAMEWORK FOR UNDERSTANDING AND EMPOWERING BATTERED WOMEN, IN ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN 240, 242 (Martha B. Straus ed. 1988)).

causes considerable emotional and social disruption to children's lives, including missed school, frequent relocations, and an increased tendency to run away.[15]

B. *Domestic Violence in the Military*

The military is said to be a mirror of the society from which it draws its members, and as such it is not immune from domestic violence. At least one comprehensive study of domestic violence in Colorado Springs, however, has concluded that the incidence of domestic violence in the military is actually higher than in the civilian population.[16] Domestic battering by military members is less likely to be reported, especially if the victim is an officer's wife.[17] Wives fear reporting domestic violence because such reports often have an adverse effect on the husband's career, with negative economic consequences for the family.[18] Military members are also subject to frequent moves which make detection and tracking of abusive relationships much more difficult.[19]

Additionally, some of the same character traits common to batterers are also the traits of successful military men. A batterer is likely to be a strong traditionalist who sees the man as master of his house. He often believes he has the right to use violence to enforce his will.[20] Since the typical batterer is rarely violent in other relationships outside the family, however, he may even be perceived as "charming,"[21] and may actually enjoy a very high reputation in the military community.

In 1976, the Department of the Navy formally acknowledged the existence of family violence within the military community and its serious

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[15] Zorza, *supra* note 11, at note 960 n. 263 (citing M. ROY, CHILDREN IN THE CROSSFIRE: VIOLENCE IN THE HOME--HOW DOES IT AFFECT OUR CHILDREN 89-90 (1988).

[16] Zorza, *supra* note 11 at 151. *See also*, Patricia Oladeinde, *Breaking the Silence: Navy Combats Domestic Violence*, ALL HANDS, July 1995, at 38, 40.

[17] Zorza, *supra* note 11, at 948 n. 153.

[18] *Id.* at 72.

[19] Zorza, *supra* note 11, at 947 n. 149.

[20] Waits, *supra* note 7, at 287-88.

[21] LENORE WALKER, THE BATTERED WOMAN XV 24-26 (1979).

effects.[22] The Family Advocacy Program was created that year in response to the rising awareness of the nature and extent of this problem.[23] Provision was also made in the implementing instruction to track spouse abuse reports with data on the offender and victim.[24] These reports show that within the Navy alone, reported cases of spouse abuse are substantially on the rise, increasing more than 100% in one decade from 2,505 in 1985 to 5,228 in 1995.[25] Reported cases of spousal assault reached a peak in 1992 at 6,345. Even with the subsequent personnel draw-down, the numbers remain high.[26] Particularly alarming is that during that decade, 44 substantiated deaths are directly attributable to spouse abuse.[27]

The Secretary of the Navy, in the policy instruction which forms the basis of the Navy's Family Advocacy Program, noted that "[a]busive behavior by DON personnel destroys families, detracts from military performance, negatively affects the efficient functioning and morale of military units, and diminishes the reputation and prestige of the military service."[28] The consequences of domestic violence are so far-reaching because of the uniquely harmful effects which have become better understood over the past two decades.

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[22] DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 1752.3A, FAMILY ADVOCACY PROGRAM, para. 5 (Sept. 1, 1995)[hereinafter SECNAVINST 1752.3A].

[23] *Id.* at para. 5b. The Instruction states that "spouse abuse [is a] serious behavioral, social and community problem which requires a comprehensive, community-based response." *Id.*

[24] DOD Child and Spouse Abuse Report, DD Form 2404. *Id.* at enclosure (3).

[25] These statistics are kept by the Navy's Bureau of Personnel (Code PERS-661), in accordance with SECNAVINST 1752.3A (1 Sept 1995). Additionally, an informal survey of the Military Justice case reporters shows a sharp increase since approximately 1985 in the number of reported appellate cases involving spouse abuse.

[26] *See* Table I, Appendix. This table is the unofficial compilation of spousal assault cases in the Navy, kept by the Bureau of Naval Personnel (Code 661) pursuant to SECNAVINST 1752.3A.

[27] *Id.*

[28] SECNAVINST 1752.3A, at para. 5a.

III. DOMESTIC BATTERING AND ITS UNIQUELY HARMFUL EFFECTS

A. *What is Battered Women's Syndrome?*

Domestic battering is the physical battering of one spouse by the other.[29] Usually, although not exclusively,[30] it describes male violence against women domestic partners. The psychological, behavioral, and emotional dynamic resulting from this battering is characterized by a recurring and predictable pattern of responses from the victim known as Battered Women's Syndrome.[31]

The battering relationship is typified by a cycle of violence involving three stages--a tension building phase, an acute battering incident, and a tranquil, or "honeymoon period."[32] Typically, the cycle begins with minor battering incidents in which the man uses physical violence to punish or control the woman in the relationship.[33] After these incidents, the woman attempts to

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[29] LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984). In her testimony in People v. Aris, 215 Cal. App.3d 1178, 1194, 264 Cal. Rptr. 167, 178 (1989), Dr. Walker defined a battered woman as one "who has been, on at least two occasions, the victim of physical, sexual, or serious psychological abuse by a man with whom she has an intimate relationship."

[30] *See, e.g.*, People v. Yaklich, 833 P.2d 758 (Col Ct. App. 1991)(quoting LENORE WALKER, THE BATTERED WOMEN (1979), which acknowledges that, although the circumstances are rare, men may be victims of this same syndrome).

[31] United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992)(recognizing battered woman syndrome as behavioral and psychological reaction to long-term abuse); People v. Romero, 26 Cal. App. 4th 315, 13 Cal. Rptr. 2d 332, 336 (Cal. Ct. App. 1992), *vacated* 8 Cal. 4th 728, 883 P.2d 388, 35 Cal. Rptr.2d 270 (Cal. 1994); People v. Aris, 215 Cal. App.3d 1178, 264 Cal. Rptr. 167, 178 (Cal. Ct. App. 1989); People v. Yaklich, 833 P.2d 758, 760-1 (Colo. Ct. App. 1991).

[32] In *Aris*, Dr Walker testified that the abuse "tends to follow a three-stage cyclical pattern of 'tension-building,' 'acute explosion,' and 'loving contrition.'" 215 Cal. App. 3d 1178, 264 Cal. Rptr. at 178.

[33] A. JONES & S. SCHECTER, WHEN LOVE GOES WRONG 81-82 (1992). There is a misperception that batterers abuse their wives because of outside pressures or some behavior on the part of the victim. The reality is that batterers beat their mates as a means of exercising power and control over them, and no changes in the victim's behavior will stop the abuse. *Id.* The abuser tends to blame his actions on other people, especially the victim, and to accuse her of infidelity, which is a manifestation of his desire for power and control within the relationship. Adams, *Identifying the Assaultive Husband in Court: You be the Judge*, 33 BOSTON BAR J. 24 (July/August 1989); Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929 (1994).

placate the batterer to prevent an escalation of violence. However, as the tension grows in the relationship these efforts to placate become more and more ineffective, the battering becomes more acute, and the honeymoon periods become shorter and shorter.[34]

Over time, women in battering relationships develop Battered Woman's Syndrome, which is symptomized by a form of learned helplessness as a coping mechanism for the abuse.[35] In other words, as battered women become increasingly unable to predict the consequences of their actions, they begin to accommodate the abuse and respond passively to the threats and violence and make no attempt to leave the abuser.[36] Battered women also often remain in the relationship because they intermittently receive positive reinforcement -- especially during the "loving contrition" stage -- and because terminating the relationship usually has adverse economic consequences for them.[37] Another reason women do not leave battering relationships is the well-founded fear that

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[34] LENORE WALKER, TERRIFYING LOVE (1989); LENORE WALKER, THE BATTERED WOMAN SYNDROME (1989); Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Women Syndrome and Rape Trauma Syndrome*, 25 COLUM. J.L. & SOC. PROBS. 277 (1992); People v. Aris, 215 Cal Rptr 3d 1194-95, 264 Cal Rptr 167 (1989).

[35] For an excellent discussion of the victim's downward spiral into learned helplessness, *see* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 279-85 (1985). *See also,* Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 63 (1991)(disputing assumption that battered women are free to leave the abusive relationship).

[36] WALKER, TERRIFYING LOVE, *supra* note 34, at 49-51; *Aris*, 264 Cal. Rptr. at 178. Dr. Walker testified that learned helplessness is developed by battered women because they often do not know why they are beaten on any particular occasion. The violence is perceived as random and, because of this randomness, the woman believes she is incapable of doing anything to prevent the abuse. *Id.* at 1194-95. For example, in People v. Romero, 26 Cal. App. 4th 315, 13 Cal. Rptr. 2d 332, 336 (Cal. Ct. App. 1992), *vacated* 8 Cal. 4th 728, 883 P.2d 388, 35 Cal. Rptr.2d 270 (Cal. 1994), the defendant wife was charged with robbery. The appellate court held it was reversible error for the trial court to refuse the defendant the opportunity to admit evidence of duress in that she was helpless to leave the relationship with her husband or refuse his demands that she assist him in committing the robberies because she suffered from battered women's syndrome. *Id.* at 338.

[37] Testimony of Dr. Lenore Walker in *Aris*, 264 Cal. Rptr. at 178. *See also,* United States v. Ortiz, 34 M.J. 831, 833-34 (A.F.C.M.R. 1992)(refusing to testify because she had "forgiven him" and did not want to cause "family problems").

if they try to escape, they will be hunted down and seriously hurt or even killed.[38] It is well documented that the level of violence often escalates at the time of separation, and it is then that battered women face the greatest danger of being murdered.[39]

B. *What Are the Effects of Domestic Battering?*

There are numerous particularly harmful effects arising from these violent relationships, and there is no longer any question that the harm caused by domestic battering has consequences reaching far beyond the healing of bruises. For instance, there is substantial evidence to indicate that a child who grows up witnessing abuse in the home is much more likely to be abusive or victimized in his or her adult relationships.[40]

Additionally, an abused spouse has often lived with years of threats, fear, manipulation, intimidation and coercion as part of the abusive relationship.[41] This climate of hostility surrounding the physical violence itself can include, for example, the victim's financial and social isolation, and use of

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[38] *See e.g.*, United States v. Ryan, 1995 WL 434448 (A.F.C.C.A. June 26, 1995)(unpublished), in which a master sergeant was convicted of kidnapping his estranged wife, assault and battery against her, and communicating a threat to kill her--it should be noted that this incident was preceded by at least five prior domestic incidents; *See also* Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1979), *aff'd* 455 A.2d 893 (D.C. 1983); and Bob Hohler, *Some are Urging At-Risk Women to Purchase Guns*, BOSTON GLOBE, January 9, 1993, at B1; Roberta K. Thyfault, Comment, *Self-Defense: Battered Woman Syndrome on Trial* 20 CAL. W. L. REV. 485, 489 (1984).

[39] Loraine Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895 (1981). Many abusive men pursue the women who leave them motivated by the idea: "If I can't have you, nobody will", Bob Hohler, *Court's Shield Can Draw a Bullet*, BOSTON GLOBE, October 7, 1992, at B1 (quoting the director of a treatment program for men who abuse women, acknowledging that women in an abusive situation face the greatest risk of violence when they try to end the relationship); People v. Romero, 26 Cal. App. 4th 315, 13 Cal. Rptr. 2d 332, 336 (Cal. Ct. App. 1992), *vacated* 8 Cal. 4th 728, 883 P.2d 388, 35 Cal. Rptr.2d 270 (Cal. 1994); *United States v. Shepard*, 34 M.J. 583 (A.C.M.R. 1992), aff'd, 38 M.J. 408 (C.M.A. 1993); United States v. Ryan, 1995 WL 434448 (A.F.C.C.A. June 26, 1995)(unpublished); and United States v. Fithian, 1995 WL 126655 (A.F.C.C.A. March 7, 1995)(unpublished).

[40] L. OHLIN & M. TONRY, FAMILY VIOLENCE IN PERSPECTIVE, 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 1, 12 (Ohlin & Tonry ed. 1989)(citing increased evidence that family violence predisposes both victim and abuser to commit violence outside the home, and asserting that children reared in violent families are more likely to reenact similar violence upon reaching adulthood). *See also* Waits, *supra* note 7, at 288, (stating that "most batterers were themselves beaten as children or saw their fathers beat their mothers, or both").

[41] Waits, *supra* note 7, at 286-88.

the couple's children by the batterer as pawns in the struggle for control within the relationship.[42]

The body of literature from psychologists and counselors, who report that battered spouses are subject to psychological victimization in addition to the physical harm they suffer, is large and well-documented. These psychological scars can be substantially more debilitating for the victim than the actual battering itself. Consistent reported effects of domestic violence include the emotional paralysis that grows out of the battering relationship.[43] In fact, a battered woman's situation is often described in terms similar to those reserved for hostages:[44] she is bound by emotional and psychological hopelessness, isolation from family and friends, total financial dependence on the batterer, shame, guilt and ever-present fear.[45]

IV. CURRENT ASSAULT AND BATTERY CHARGE INADEQUATE TO ADDRESS UNIQUELY HARMFUL EFFECTS OF DOMESTIC BATTERING

A. *Current Charging Practices in Military Courts*

Typically, a domestic violence case comes to a military prosecutor after a particularly serious occurrence of marital violence which was preceded by

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[42] *Id. See also*, United States v. Plair, No. ACM 30512, 1994 WL 714300 (A.F.C.C.A. December 14, 1994)(not reported). In *Plair*, the accused was convicted of murdering his wife after, by his own admission, punching a hole in a door when he was angry at her, pointing a loaded weapon at her on about eight other occasions, telling her when she could feed their infant daughter, punishing her by restricting her to their home, and limiting her contact with family and friends. *Id.*

[43] Walker, *supra* note 29, at 203.

[44] In State v. Hodges, 239 Kan. 63, 716 P.2d 563 (Kan. 1986), the defendant was tried for the murder of her husband after years of abuse, culminating in an incident in which he tried to run her down with his truck, threatened her never to leave the house without his permission, tried to drown her in the kitchen sink by running water up her nose, and later struck her head against a doorjamb twenty times. *Id.* at 64, 564-65.

[45] State v. Bednarz, 179 Wis.2d 460, 507 N.W.2d 168, 170 (Wis. 1993); State v. Hodges, 239 Kan. 63, 716 P.2d 563, 567 (Kan. 1986); Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665, 668-69 (1990).

years of physical abuse within the relationship.[46] Often, the prosecutor has one or, at most, a few instances of actual abuse available to charge.[47] Other instances of battering are too often lost to the statute of limitations, or they may blur past the victim's specific memory into the pattern of violence and be too dimly remembered to form the basis of a charge. Additionally, as a practical matter, many of the violent episodes are in the home, unwitnessed, unreported, and without any corroborating evidence. For tactical reasons, these instances of violence, though reported, must often be omitted from the charge sheet entirely. Thus, the only charge a prosecutor often has to describe the criminal behavior of a long term abusive batterer is a single specification of some form of assault and battery.[48]

Under the Uniform Code of Military Justice, military prosecutors may charge a service member accused of battering his wife with Assault Consummated by a Battery under Article 128, UCMJ.[49] The maximum punishment for this charge is six months confinement.[50] If the accused is an officer, he may be charged with Conduct Unbecoming an Officer and Gentleman

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[46] *See, e.g.*, United States v. Hancock, 38 M.J. 672 (A.F.C.M.R. 1993)(accused struck his wife five times and choked her once over a period of a year, and then, just before trial, he struck her again and threatened to kill her); United States v. Ryan, 1995 WL 434448 (A.F.C.C.A. June 26, 1995)(unpublished)(accused's conviction for kidnapping, assault and battery, and threatening to kill his wife was preceded by at least five known domestic incidents); United States v. Jones, No. ACM 29895, 1994 WL 363512 (A.F.C.M.R. 1994)(unpublished) (accused, after at least two prior incidents requiring intervention by the authorities, slammed his wife into the wall, causing a half inch indentation conforming to the outline of her body, threatened her with a knife, slashed her neck, chin and legs, and beat her with a metal table leg).

[47] For example, in State v. Bednarz, 179 Wis.2d 460, 507 N.W.2d 168 (Wis. 1993), the defendant was only charged with one misdemeanor battery, even though the victim reported at the time of the assault, that she had suffered previous physical assaults, with the last assault occurring six months before. *Id.* at 462, 507 N.W.2d at 169.

[48] This is based on anecdotal information and conversations with various trial counsel throughout the Naval Legal Service Command (NLSC). There is currently no method to track or compile case profiles within the NLSC.

[49] Manual for Courts Martial, United States (1995 edition), pt. IV, para. 54(b)(2) [hereinafter MCM].

[50] *Id.* at para. 54(e)(2).

under Article 133.[51] Under rare circumstances, Aggravated Assault may be charged under Article 128, but only under the unusual circumstances in which the charged assault was committed with a dangerous weapon, with force likely to produce death or grievous bodily harm, or grievous bodily harm was intentionally inflicted.[52] For aggravated assaults, the maximum confinement punishments range from three to ten years.[53]

B. *Inadequacies of UCMJ Article 128*

If, as is generally the case, Assault Consummated by a Battery is the sole charge available to the prosecutor, the government is limited to a maximum confinement punishment of six months to address a crime that may be the culmination of years of physical, emotional and psychological abuse, and which left the victim emotionally and financially isolated, psychologically paralyzed, and living with the day-to-day uncertainty whether she will be brutalized or even killed. In other words, there is more to the crime of domestic assault than a few isolated blows and a few isolated bruises, and the current charge of Assault Consummated by a Battery is utterly inadequate to describe that crime.

Article 128, as currently drafted, fails to adequately distinguish between various types of assaults and the seriousness of the harm that may be done. Unless an assault falls under one of the specifically enumerated aggravated assaults, it by default may only be charged as an Assault Consummated by a Battery. In other words, under Article 128, a punch thrown during a barroom brawl must be charged in the same manner as a punch thrown by a husband against his wife in front of their children. For a variety of reasons, this legal assumption that one assault is pretty much the same as any other is inadequate to serve the needs of military community serious about addressing domestic violence crimes.

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[51] *Id.* at para. 59. This is not generally helpful, in terms of increasing the maximum penalty or adequately describing the crime inasmuch as the maximum punishment is limited to that of the most analogous offense, which reverts back to the six months limitation under Article 128(b)(2) and 128(e)(2). In any event, this only applies to cases involving officers.

[52] This, too, rarely helps to solve the dilemma, since by definition "grievous bodily harm" specifically does *not* include so-called minor injuries "such as a black eye or bloody nose;" rather it is reserved for "fractured or dislocated bones, deep cuts, torn members of the body, [and] serious damage to internal organs." MCM at para. 54c(4)(a)(3).

[53] *Id.* at para. 54(e)(8) and (9).

First and foremost, the current charging approach fails to account for the long term effects of domestic violence on the woman. As discussed above, the psychological effects of battered women's syndrome can be severely aggravating aspects of domestic assaults. Additionally, if any children are involved, the psychological and emotional scars they receive from growing up in a violent home can have serious and lasting consequences. Clearly, an effective punitive response to domestic violence can only come about when the charge accounts for the special dynamics of family violence.[54] Currently, no charge under the UCMJ adequately addresses the aggravated nature of domestic battering.

V. EXISTING RATIONALES FOR ELEVATING SOME FORMS OF BATTERY TO AGGRAVATED BATTERY

In the existing legislative scheme of the UCMJ, there are several bases that serve to elevate a certain kind of assault to the level of an aggravated assault.[55]

First, the drafters of the Code separated out some types of assaults[56] as aggravated based on the use of a dangerous instrument.[57] Thus, an assault is aggravated when committed with a "dangerous weapon,"[58] and any weapon may be dangerous "when used in a manner likely to produce death or grievous

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[54] Waits, *supra* note 7, at 267 (suggesting that the current legal response to domestic violence is often half-hearted because of ignorance concerning the dynamics of battering relationships).

[55] This article specifically does not attempt to address the comparative punishment under the UCMJ for sexual assaults versus domestic violence. Although there is food for thought concerning the similarities and differences between domestic violence and sexual violence, the rationales for elevating the potential punishment for sexual assaults is obvious and a further comparison is beyond the scope of this article.

[56] It is necessary to distinguish at this point the definition under the UCMJ for an assault as opposed to a battery. An "assault" is defined as "an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated." MCM at para 54c(1)(a). A "battery" is defined as "an assault in which the attempt or offer to do bodily harm is consummated by that infliction of that harm." MCM at para. 54c(2)(a). These definitions comport with the traditional common law definitions, although a number of jurisdictions have blurred the two concepts.

[57] *Id.* at para. 54c(4)(a)(i).

[58] *Id.* at para. 54a(b)(1).

bodily harm."[59] Thus, a battery committed with a loaded firearm is aggravated even when, for instance, the firearm is used as a bludgeon, because "the danger injected is significantly greater when[ever] a loaded firearm is used . . . ."[60] The focus of this first category of aggravated assaults is clearly the seriousness of the bodily harm which can *potentially* be inflicted on a victim assaulted with a weapon. Thus, the act of pointing a loaded firearm at another is punishable by up to eight years of confinement,[61] even though no physical harm resulted,[62] because of the potential seriousness of the physical harm to the victim and the seriousness of the actual psychological harm[63] caused by the apprehension of imminent violence.

The second rationale the drafters of the UCMJ used to elevate the potential punishment for batteries is the severity of the physical harm actually done to the victim.[64] The rationale in this instance--prevention of serious bodily harm--is similar to the rationale for elevating assaults with a dangerous weapon, only here the focus is on the **actual** seriousness of injury to the victim, whereas the former rationale focused on the **potential** seriousness of injury. Battering is therefore aggravated under the UCMJ where "grievous bodily harm" results.[65]

A third elevated form of assault under the UCMJ was carved out based upon the circumstances of the battery, e.g., if it was committed at night in the victim's home during a burglary.[66] Such assaults are considered aggravated

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[59] *Id.* at para. 54c(4)(i).

[60] *Id.* Appendix 23, para. 54e, at A23-15.

[61] *Id.* at para. 54e(8)(a).

[62] *Id.* at para. 54e(9)(a) provides that if actual injury, e.g., a battery, is inflicted with a loaded firearm the maximum punishment is increased even further to 10 years.

[63] The definition of assault includes creation "in the mind of another a reasonable apprehension of receiving immediate bodily harm." *Id.* at para. 54c(1)(b)(ii). This clearly evidences a component of psychological harm to criminal assault, since the fear in the mind of the victim created by the accused's acts is the object of punishment.

[64] *Id.* at para. 54c(4)(a)(ii).

[65] *Id.* at para. 54a(b)(1) and (2).

[66] *Id.* at para. 64 delineates several types of assaults committed with the intent to commit or while committing another listed felony.

because they are committed as a means of attaining some further criminal object. Thus, the assault which serves to accomplish a further criminal violation of the sanctity and security of the victim's home is punishable by up to ten years confinement[67] specifically because the accused harms not only the physical person of the victim, but also the peace and security of the victim's home.[68]

A fourth rationale for aggravating certain types of assaults is based on the status of the victim.[69] Thus, an assault upon a military officer by another servicemember is punishable by up to three years confinement.[70] This increased punishment underscores Congressional commitment to protect good order and discipline in the military and to ensure smooth operations within the service. Officers are a specially protected class because without respect for their authority the strength of the military as an institution is undermined.

Under this same rationale, children too are a protected class. Battering a child under the age of 16 can result in a maximum punishment of confinement of up to two years.[71] Children are a protected class because they are uniquely vulnerable, both physically and mentally, to the harmful effects of battering.[72] Thus, the status of the victim--either as a particularly vulnerable person or one whom society has a special interest in protecting--is a recognized rationale for elevating the maximum punishment for an assault or battery.

The final rationale, though common in state law, is not found in the UCMJ. Some jurisdictions consider the status of the accused an aggravating

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[67] *Id.* at para. 64e(2).

[68] The Commonwealth of Massachusetts has a similar statute which provides that a person who "enters a dwelling house and therein assaults another with the intent to commit a felony" may be punished by up to 10 years confinement and shall not be eligible for parole in less than 5 years. MASS. GEN. LAWS ANN. ch. 265, sec. 18A (West 1995). If the assault is committed with a dangerous weapon during a burglary, the maximum punishment is life imprisonment with not less than 10 years confinement before eligible for parole. *Id.* ch. 266, sec. 14.

[69] MCM at para. 54c(3).

[70] *Id.* at para. 54e(3).

[71] *Id.* at para. 54e(7).

[72] Under the same rationale, Florida, like many other states, makes battery committed against a victim 65 years of age or older an assault which allows increased punishment. FLA. STAT. ANN. § 784.08 (West 1995).

factor to certain assaults. For instance, Wisconsin[73] punishes battery by a prisoner as an aggravated assault. The law expresses the public sentiment that certain persons are uniquely situated to create increased harm by their violent acts.

As has been demonstrated, the UCMJ recognizes the propriety of increasing punishment for assaults based on the presence of one or more of the following aggravating factors: potential or actual serious physical harm; psychological harm; violation of the victim's domestic security; harm to uniquely fragile victims; or harm by those in uniquely destructive positions. All are factors which under the UCMJ elevate certain assaults to aggravated assault status. And each factor, as outlined in sections II and III above, is common to domestic battering: serious physical violence, which is often long-term; debilitating psychological damage; the systematic destruction of the victim's domestic tranquility and replacement with an environment of constant fear; the progressive psychological fragility of a domestic victim with nowhere to retreat for safety; and, because of the dynamics of the battering relationship, the unique power of the abuser to inflict physical and mental harm on the victim spouse.

Because each of the aggravating factors recognized by the UCMJ is present in the battering relationship, the next step the military should take to seriously address the issue of domestic battering is to elevate spousal assaults to the level of an aggravated assault.

VI. ADDRESSING DOMESTIC BATTERING CRIMES WITH CIVIL REMEDIES

In the past, many states, and to a great extent the military too, have relied on civil remedies to enhance victim protection, rather than enacting statutes with increased criminal sanctions for spousal assaults.

Texas, for instance, has taken the approach that enhanced civil protections for the victim are necessary and required. The Texas legislature passed legislation beginning in 1979 that opened up various civil remedies to victims of domestic violence.[74] Prior to 1979, the legal alternatives available

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[73] WIS. STAT. ANN. §§ 940.19(1), 946.43 (West 1995).

[74] *See* TEX. FAM. CODE ANN. §§ 71.01-71.19 (Vernon 1986 & Supp. 1995), and TEX. CODE CRIM. PRO. ANN. art 5.01(a)(Vernon Supp. 1995), which states: Family violence is a serious danger and threat to society and its members. Victims of family violence are entitled to the

to abused women in Texas largely consisted of criminal prosecutions and divorce actions, but no civil remedies existed to address the more immediate danger to the victim presented by an abusive spouse.[75]

The Texas legislature recognized the victim's need for civil remedies to guarantee short-term safety and passed legislation which: (1) emphasizes the seriousness of the problem of family violence and stresses the entitlement of victims to protection by law;[76] (2) establishes protection of domestic violence victims as a primary duty of responding law enforcement officers;[77] (3) directs officers to apprise domestic violence victims of their rights and means to prevent further violence;[78] (4) provides guidelines for documenting investigation of incidents of domestic violence;[79] (5) provides authority to make warrantless arrests in domestic violence situations;[80] and (6) provides for on-going training of police officers on domestic violence issues.[81]

The federal government has a strong program for protection and assistance to victims of crimes enacted under the Victim and Witness Protection Act of 1982.[82] The Department of Defense and the Department of the Navy have implemented this legislation with various instructions[83] which provide, for

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maximum protection from harm or abuse, or the threat of harm and abuse as is permitted by law. *See also*, James Truss, *The Subjection of Women...Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 St. MARY'S L.J. 1147 (1995).

[75] Truss, *supra* note 74, at 1149, 1174 n.78.

[76] TEX. CRIM. PROC. ANN. § 5.01 (Vernon Supp. 1995)

[77] *Id.* at § 5.04(a).

[78] *Id.* at § 5.04(b).

[79] *Id.* at § 5.05.

[80] *Id.* at § 14.03.

[81] *Id.* at § 415.034.

[82] 42 U.S.C. § 10601 (1982) and 18 U.S.C. §§ 1512-1514 (1982).

[83] *See e.g.*, DEP'T OF DEFENSE DIRECTIVE 1030.1, VICTIM AND WITNESS ASSISTANCE (November 23, 1994); DEP'T OF DEFENSE DIRECTIVE 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (December 23, 1994); DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5800.11, PROTECTION AND ASSISTANCE OF CRIME VICTIMS AND WITNESSES (March 12, 1986)[hereinafter SECNAVINST

instance, that the victim of a crime has a right to be reasonably protected from the accused offender, to be notified of and present at court proceedings, and to confer with the attorney for the Government in the case.[84] These instructions place an affirmative duty on government agents to assist victims with the financial difficulties directly resulting from the crime,[85] to assist in obtaining transportation, child care, and other services in preparation for court appearances,[86] and to provide help in securing financial assistance for family relocation after a conviction is obtained.[87]

The Navy has also taken another substantial step in victim assistance through creation of the Sexual Assault Victim Intervention Program,[88] and encouraging the use of Military Protective Orders to protect family members from abuse.[89]

Civil remedies and counseling assistance alone are often insufficient to assist the needs of battered women. First and foremost, civil remedies only assist victims of crimes which have already occurred. They do next to nothing at all to prevent the violence from occurring, or as is more likely, from reoccurring.

5800.11]; and DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5800.11A VICTIM AND WITNESS ASSISTANCE PROGRAM (June 16, 1995).

[84] DEP'T OF DEFENSE DIRECTIVE 1030:1, para. D.4.a.-g.

[85] SECNAVINST 5800.11, enclosure (3), paragraph 2.e.

[86] *Id.* at para. 2.f.

[87] *Id.*

[88] *See* CHIEF OF NAVAL OPERATIONS INSTRUCTION 1752.1, RAPE PREVENTION AND VICTIM ASSISTANCE (13 September 1985)[hereinafter OPNAVINST 1752.1], para. 3.c.

[89] SECNAVINST 1752.3A at para. 7.H.(6) directs commanding officers to "take reasonable actions to ensure the safety of . . . family members," and suggests the use of Military Protective Orders (MPO). The Marine Corps is ahead of the Navy on this issue. Marine commanders are specifically authorized to issue MPOs to ensure the safety and security of persons within their commands, or to protect other individuals from persons within their command. Marine Corps Order P1752.3B, Marine Corps Family Advocacy Program Standing Operating Procedures, (1 July 94) at appendix K, para. 2.

Additionally, victims may not be aware of their civil remedies or understand how to exercise them.[90] When a victim seeks legal help or attempts to leave the relationship she is frequently at the highest risk for violence.[91] Unfortunately, there are many cited cases in which women have exercised their civil remedies and found enforcement difficult or ineffective.[92] Even in the military, where the accused's Commanding Officer has the power to enforce a Military Protective Order with some form of pre-trial restraint, many courts-martial try accused for repeated violations of a Military Protective Order in addition to the underlying battering charge.[93] In short, even a Military

[90] Kinports & Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 227 (1993) (noting that police officers often fail to provide domestic violence victims with information about available protection even though state statutes imposes such a duty upon them). *See also* Brown v. Grabowski, 922 F.2d 1097, 1116 (3d Cir. 1990), *cert. denied,* 501 U.S. 1218 (citing failure of police to inform victim of her right to protection as required by statute where victim was later found frozen to death in the trunk of a car in which her boyfriend imprisoned her).

[91] A. BROWNE, WHEN BATTERED WOMEN KILL 66, 67 (1987); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991) (stating that at the point of separation the batterer's need for control often becomes most acutely violent); Laura L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 930 (1991); Bob Hohler, *Court's Shield Can Draw a Bullet*, BOSTON GLOBE, Oct. 7, 1992 (Metro), at 1.

[92] Thetford v. City of Clanton, 605 So. 2d 835, 836-37 (Ala. 1992)(noting officer's failure to file statutorily-required report after witnessing indications of physical abuse on woman later killed by her husband); Ashby v. City of Louisville, 841 S.W.2d 184, 185-6 (Ky. Ct. App. 1992)(beating death of woman by her husband after she obtained a protective order and a court order directing husband's arrest, but police failed to arrest husband). Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 997-98 (1993)(discussing the ineffectiveness of protective orders and that sometimes police even find copies of restraining orders with bodies of murder victims); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM L. & CRIMINOLOGY 46, 61 (1992) (pointing out that restraining orders can often create a false sense of security); James Truss, *The Subjection of Women...Still: Unfulfilled Promises of Protection of Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, n. 121 (1995) (discussing under estimation by police officers responding to domestic violence of the risk of further violence to the victim).

[93] *See e.g.*, United States v. Chandler 39 M.J. 119 (C.M.A. 1994); United States v. Carruthers, 37 M.J. 1006 (A.C.M.R. 1993)(accused convicted of returning to marital home in violation of a Military Protective Order and battering his wife); United States v. Ryan 1995 WL 434448 (A.F.C.C.A. June 26, 1995)(unpublished)(accused convicted at general court-martial of willful violation of the command of a superior officer in addition to severe acts of domestic violence); United States v. Fant, 1993 WL 345222 (AFCMR Sept 1, 1993)(not reported).

Protective Order or other restraining order often provides no more protection to the victim.[94]

Finally, civil remedies alone, though important to guaranteeing the immediate safety of the victim, do not interrupt the cycle of violence. They are available only after an abusive incident and ultimately do nothing to deter future violent episodes. Some reports even indicate that handing a restraining order to an abusive man, bent on controlling his wife, has the effect of actually inflaming the violence.[95]

The laudable focus of injunctive civil remedies is the short-term protection for the victim during a cooling-off period in the relationship. But as a conceptual matter, this treats spousal battering as a function of tension in a relationship, and utterly fails to recognize that battering is a mechanism of power and control. Only through clear societal condemnation of the batterer's use of violence to assert dominance will victims be assured of obtaining lasting results.[96] What studies consistently show is that the single most effective tool to end spousal battering is arrest and confinement.[97] The most effective tool to accomplish this result is a charge that fits the crime.

VII. ADDRESSING DOMESTIC BATTERING AS A CRIMINAL ACT

A number of states have specifically addressed spousal battering in their criminal codes in an attempt to provide increased protection for "wives [who are the] object of abuse by their spouse."[98] Two states' laws provide especially good protection for victims of domestic violence.

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[94] Bob Hohler, *Court's Shield Can Draw a Bullet*, Boston Globe, October 7, 1992, at B1, reporting the results of a 1992 Massachusetts study conducted by the Secretary of Public Safety that showed nearly 1000 women request restraining orders in Massachusetts each week, and approximately 150 men violate restraining orders each week.

[95] *Id.*

[96] *Id.* (reporting that in 1991 Massachusetts' courts issued 44,000 restraining orders, an impossible load for the law enforcement system to attempt to enforce).

[97] *Id.* (submitting that the experience of Massachusetts concerning the ineffectiveness of civil remedies is not unique). *See also*, Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM L. AND CRIMINOLOGY, 46, (1992), and L. Walker, THE BATTERED WOMAN SYNDROME, *supra* note 34, at 137.

[98] People v. Silva, 27 Cal. App. 4th 1160, 33 Cal Rptr 2d 181 (Cal. Ct. App. 1994).

A. *The Ohio and California Models*

Ohio law currently provides that "No person shall knowingly cause or attempt to cause physical harm to a family or household member . . . whoever violates this section is guilty of domestic violence."[99] Such a violation is a first degree misdemeanor with a maximum penalty of six months,[100] and conviction of a repeat offense is a felony[101] with a maximum confinement penalty of five years.[102]

Additionally, Ohio law also prohibits the use of threats of violence or coercion within the family unit. The law states that "No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member."[103] The penalty for this type of intimidation is conviction of a fourth class misdemeanor, with a maximum jail sentence of 30 days confinement.[104]

Under Ohio law, a spouse, a person living as a spouse, or a former spouse is considered to be a family member for domestic violence purposes.[105] This concept has been extended by caselaw to two persons who are cohabitating. An actual marriage is not necessary for family member status for purposes of prosecution under the domestic violence statutes.[106]

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[99] OHIO REV. CODE ANN. § 2919.25(A), (D) (Anderson 1995).

[100] *Id.* § 2929.21(B)(1).

[101] The Ohio legislature recently enacted changes to § 2919.25(D) which makes a repeat offense a fifth degree felony, rather than a fourth degree felony. This change became effective 1 July 1996.

[102] *Id.* § 2929.11(B)(7).

[103] *Id.* § 2919.25.

[104] *Id.* §§ 2919.25(D), 2929.21(B)(4).

[105] *Id.* § 2919.25(E).

[106] *See e.g.*, State v. Hadinger, 573 N.E.2d 1191, 61 Ohio App.3d 820 (Ohio App. 1991)(statute is applicable to two persons who are cohabitating regardless of their sex); State v. Wagner, No. 2205, 1993 WL 303255 (Ohio App. August 11, 1993)(cohabitation for two weeks with a sexual relationship is sufficient to fall under the domestic violence statute).

California law likewise provides that "[a]ny person who willfully inflicts upon his or her spouse . . . corporal injury . . . is guilty of a felony [with a maximum penalty of four years confinement]."[107] A person need not be married to his victim in order to be prosecuted under this statute, cohabitation is sufficient.[108] In reviewing the rationale behind the statute, the California courts have specifically held that this aggravated form of battery is proper to protect society's interests in the intimate relations between persons of the opposite sex, that the law realistically recognizes the increasing number of "meretricious" relationships that exist, that violent encounters between partners is not limited to married couples, and that the state has an interest in protecting the safety of all cohabiting people.[109] The courts held that the conviction of a felony offense for spousal battering is thereby justified.[110]

B. ***Federal law developments***

The federal government has also recognized that spousal battering is a significant problem, and that victims of domestic violence need special protections. Recently, Congress passed a provision under which anyone who crosses state lines to commit an act of domestic violence can be punished with confinement of up to five years--10 years if serious bodily injury results.[111] Congress also provided for compensatory and punitive damages for crimes of violence motivated by gender,[112] specifically recognizing that "all persons within the United States . . . have the right to be free from crimes motivated by gender."[113]

Additional developments include creation of an affirmative defense to parental kidnapping, that the parent was "fleeing an incidence or pattern of

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[107] CAL. PENAL CODE § 273.5(a)(1996).

[108] *Id.* § 273.5(b).

[109] People v. Guterriez, 171 Cal. App. 3d 944, 217 Cal. Rptr. 616 (Cal. Ct. App. 1985).

[110] *Id.*

[111] 18 U.S.C. § 2261, (1996).

[112] 42 U.S.C. § 13981(c) (1996).

[113] *Id.* § 13981(b).

domestic violence,"[114] and a Congressional mandate for the Attorney General to study and report on battered women's syndrome and its use in criminal trials.[115]

VIII. PROPOSAL AND RATIONALE FOR MODIFICATION OF ARTICLE 128 OF THE UCMJ

There is movement in the law toward enhanced civil protections for battered women, and heightened criminal sanctions for domestic violence offenders. There is movement at both the state and federal levels. Unfortunately, the military has so far only followed suit in the area of civil assistance for victims of domestic violence. It is time for the Uniform Code of Military Justice to be amended to properly reflect the uniformed services' commitment to decisively deal with domestic violence offenders and to protect women who are victims of male battering.

A. *Proposed Modifications to Article 128 of the UCMJ.*

To implement an enhanced punishment option for domestic battering offenses, Congress or the President should amend Article 128 of the Uniform Code of Military Justice to include a specific offense of spousal battering with a maximum possible confinement higher than the current six month limit imposed for assault consummated by a battery. Specifically, to paragraph 54b(3) **Assaults permitting increased punishment based on status of victim**,[116] should be added the following specification and elements:

(d) **Assault consummated by a battery upon the accused's spouse.**

(i) That the accused did bodily harm to a certain person;
(ii) That the bodily harm was done with unlawful force or violence; and
(iii) That the person was then the spouse of the accused.

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[114] 18 U.S.C. § 1204(c)(2) (1996).

[115] 42 U.S.C. § 14013 (1996).

[116] MCM, *supra* note 49, para. 54b(3).

Additionally, to paragraph 54c(3)[117] should be added the following explanation:

(d) **Assault consummated by a battery upon the accused's spouse**. The maximum punishment is increased when assault consummated by a battery is committed upon the accused's spouse. The spouse need not be residing with the accused at the time of the assault, but must have resided with the accused within one year of the acts in question. For the purpose of this specification, the term spouse includes a domestic partner to whom the accused is not legally married, but with whom the accused has a domestic relationship or with whom the accused had a domestic relationship within one year of the acts in question.[118]

And to paragraph 54e. **Maximum punishment**,[119] should be added:

(10) **Assault consummated by a battery upon the accused's spouse**. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

B. ***Rationale.***

First and foremost, separating out domestic battering as a distinct offense underscores society's condemnation of the batterer's crime and solidly affirms the right of victims to live in their own homes free from physical and psychological abuse.

The ability of the convening authority to file the most serious charge that can be supported in good faith also sends the message to abusers that their conduct is criminal and will not be tolerated by the military.[120] Conviction of the most serious offense supported by the evidence also gives the sentencing

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[117] *Id.* at 54c(3).

[118] This definition of domestic partner may conceptually be in conflict with para. 69 of the MCM, Article 134 Wrongful Cohabitation, in which an accused can be convicted of the offense of publicly living with another, holding themselves out as husband and wife. It is the author's opinion, however, that any conceptual differences should be resolved in favor of recognizing the reality that spousal battering is not limited to marital relationships, and that punishment of offenders and protection of victims of such violence ought to be the paramount legislative priority.

[119] MCM, *supra* note 49, at para. 54e.

[120] Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 966 (1986).

authority the widest number of options in crafting an appropriate punishment for each individual batterer.[121]

Additionally, substantial, meaningful punishment needs to be available because negative reinforcement has proven repeatedly to be the most effective mechanism for ending an offender's battering.[122] Imposing a stiff sentence forces the convicted batterer to confront the serious nature of his crimes and, to the extent that deterrence is effective, may prevent other batterers from drawing comfort in light treatment of violent abusers.

Creating a specific domestic assault charge also exercises the government's independent duty to protect children from the emotional and psychological damage of growing up in a violent home.[123] If the cycle of violence, passed from one generation to the next is to be broken, a strong punitive response must be available.

IX. CONCLUSION

Spousal battering is a serious crime with serious consequences. The injuries are not just physical, they include deep emotional and psychological wounds. In addition to the battered victim, children who grow up watching this violence in their homes are also victimized. They are more likely to incorporate the cycle of violence into their own adult behaviors and perpetuate an already serious problem. Every traditional factor used as a basis to elevate some assaults to the level of aggravated offenses is present in spousal battering, and if the military is serious about intervening in this cycle of violence, setting out domestic battering as an aggravated assault offense under the UCMJ, with increased maximum penalties, is one important and effective tool. The military broke new ground when the Family Advocacy Program was created, putting the military in the vanguard of jurisdictions acting to protect victims of domestic violence. Correcting the weaknesses in the UCMJ is the next right step.

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[121] *Id.*

[122] LENORE WALKER, THE BATTERED WOMAN SYNDROME *supra* note 34, at 137; *Zorza, Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, *supra* note 11, at 929.

[123] OHLIN & TONRY, FAMILY VIOLENCE IN PERSPECTIVE, supra note 40, at 12.

APPENDIX

FAMILY ADVOCACY PROGRAM ABUSE INCIDENT DATA FY-85 THROUGH FY-95
AS REPORTED BY BUREAU OF NAVAL PERSONNEL-MARCH 1996

Spouse Abuse:	FY-95	FY-94	FY-93	FY-92	FY-91	FY-90	FY-89	FY-88	FY-87	FY-86	FY-85
Cases Reported	5,228	6,057	6,344	6,345	5,605	4,169	4,961	4,149	3,471	3,163	2,505
Substantiated	3,586	4,053	4,277	4,323	3,998	2,914	3,654	3,419	2,655	2,372	N/A
Subst. Deaths	2	5	1	4	5	3	2	6	6	2	8

Table - 1

LEVELING THE PLAYING FIELD FOR FEDERAL PROSECUTORS OR AN END AROUND ETHICS? AN EVALUATION OF THE THORNBURGH MEMORANDUM AND THE RENO RULE

*Richard M. Zanfardino**

I. Introduction

A civilian lawyer's actions are regulated by either the Model Rules of Professional Conduct (Model Rules) or the Model Code of Professional Responsibility (Model Code).[1] Likewise, the conduct of military lawyers is also

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* *Juris Doctorate, 1996, the Columbus School of Law of the Catholic University of America. Bachelor of Arts, 1990, North Carolina State University. Bachelor of Arts, 1989, North Carolina State University.* *The author extends thanks to Professor Clifford Fishman for his critique of an earlier draft of this Article. The author also gives distinctive and special thanks to his wife, Karen, for her unending support and faith. Any and all substantive errors in this Comment are the fault of the author.*

[1] *See generally*, GEOFFREY C. HAZARD JR. & WILLIAM HODES, THE LAW OF LAWYERING:A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed. 1990) (explaining and providing detailed background information regarding professional responsibility). Lawyers abide by versions of, or very close versions of, the MODEL RULES OF PROFESSIONAL CONDUCT (1995)[hereinafter MODEL RULES] or the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981)[hereinafter MODEL CODE] in forty states and the District of Columbia. LAWS. MAN. PROF. CONDUCT (ABA/BNA) 01:3-4 (1990). The following jurisdictions have adopted either the Model Code or the Model Rules: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *Id.* Florida deletes the reference to communication authorized by law. *Id.* at 71:301. The original Canons of Professional Ethics were adopted on August 27, 1908. MODEL RULES, *supra* note 1, at, preface. [Since their initial promulgation in 1983,] the Model Rules have been amended nineteen times through the years resulting in their present incarnation. *Id.* The preamble to the Model Rules states, *inter alia*, that "[m]any of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law." *Id.* at 5. However, the preamble points out that lawyers should also look towards "personal conscience" and the "approbation" of peers in the course of their professional lives and conduct. *Id.* The preamble expresses the idea that while a lawyer is a representative of clients, (s)he is also "an officer of the legal system and a public citizen having

governed under a codified set of ethical rules.[2] Historically, rules of ethics have prohibited attorneys from contacting a party to litigation without the consent of that party's counsel.[3] Disciplinary authorities in civilian and military jurisdictions have adopted similar prohibitions regarding contacts with adverse parties to litigation.[4]

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special responsibility for the quality of justice." *Id.* As for the scope of the Model Rules, "[f]ailure to comply [with the Rules] is a basis for invoking the disciplinary process." *Id.* at 7. Although this Article will deal with both the Model Rules and the Model Code, Professors Hazard and Hodes point out that the Model Rules are "now sufficiently well established to have become the new center of gravity in the law of lawyering." *Hazard & Hodes, supra,* at xlvii.

[2] The conduct of Naval judge advocates practicing under the Uniform Code of Military Justice, the Manual for Courts-Martial, 10 U.S.C. § 1044 (Legal Assistance), other laws of the United States, and regulations of the JUDGE ADVOCATE GENERAL INSTRUCTION 5803.1A preamble (July 13, 1992) (hereinafter JAGINST 5803.1A)

"Marine Corps judge advocates come under the supervisory authority of the Judge Advocate General of the Navy; therefore JAGINST 5803.1[A] is applicable to them." Col. Eileen M. Albertson, USMC, *Rules of Professional Conduct for the Naval Judge Advocate*, 35 FED. B. NEWS & J. 334, 338 n.11 (1988). The Army has promulgated a set of rules to govern its attorneys as well. *DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS* (1 May 1992) [hereinafter AR 27-26].

[3] *See supra* note 1 and accompanying text. The current ethical rule for civilian attorneys regarding contacts with represented persons is governed under MODEL RULE 4.2. *See* MODEL RULES,*supra* note 1, at Rule 4.2. This rule is the successor to Disciplinary Rule (DR) 7-104(A)(1). MODEL CODE, *supra* note 1, at DR 7-104 (A) (1). Model Rule 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id.* DR 7-104 provides:

> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE, *supra* note 1, at DR 7-104(A)(1).

The Army version of Model Rule 4.2 is nearly identical. *Compare* Rule 4.2 with the AR *27-26* Rule 4.2 (1 May 1992). The only difference is that the reference to contacts "authorized by law" is deleted in the Army version, as well as the word "party" in place of "person." *Id.* The Navy's version also bears the latter change, and the cosmetic change of "lawyer" to "judge advocate." JAGINST 5803.1A Rule 4.2 (13 July 1992).

[4] 59 Fed. Reg. 10,087 (1994); *see also supra* notes 1-3 and accompanying text (discussing the jurisdictions that have adopted the "anti-contact" rule).

Federal prosecutors and judge advocates[5] face an unusual hazard while laboring under these rules.[6] For instance, a federal prosecutor or judge advocate may be required to oversee or direct an investigation where undercover informants are in contact with represented parties.[7] Conversely, a represented defendant who wishes to become an informant may be hesitant to contact a prosecutor if his counsel is involved with other crime figures.[8] Thus, a defendant may wish to maintain counsel, but fear that his counsel would reveal his intentions to non-privileged parties.[9] The anti-contact rules prevent prosecutors from contacting represented parties.[10] Furthermore, the anti-contact rules may apply any time a person has representation of counsel

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[5] At times, this Article may refer to federal prosecutors alone. This article's applicability to judge advocates is still valid, however, as they may on occasion serve as Special Assistant United States Attorneys. Furthermore, as discussed *infra*, the ethical standards of civilian attorneys and judge advocates closely mirror one another.

[6] It is important to bear in mind the important place that government attorneys, military or civilian, hold in society. *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court noted that the function of government attorneys is "not that it shall win a case, but that justice shall be done." *Id.*

Judge advocates have been shown to perform four distinct roles. *See* Matthew E. Winter, *"Finding the Law"--The Values, Identity, and Function of the International Law Adviser,* 128 Mil. L. Rev. 1, 21-30 (1990). These include "advocate," "judge," "conscience," and "counselor." *Id.*

[7] 59 Fed. Reg. 39,919 (1994) (defining undercover operation and noting that it should be read broadly). A government attorney will not be personally responsible for the actions of agents who contact represented parties unless the agents were acting as the prosecutor's "alter ego." United States v. Heinz, 983 F.2d 609, 612-14 (5th Cir. 1983).

[8] 59 Fed. Reg. 39,921 (1994). This is often called a "fearful defendant" situation. *Id.* An excellent example of this is given by F. Dennis Saylor, IV, and J. Douglas Wilson, *Putting a Square Peg in a Round Hole*: *The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. Pitt. L. Rev. 459 (1992). In the example given by messrs. Saylor and Wilson, an Assistant United States Attorney faces the prospect of sanctions from his state bar if he responds to overtures from a represented mafia underboss, seeking to conduct negotiations without his lawyer present. *Id.* at 459.

[9] *Id.*

[10] MODEL RULES, *supra* note 1, at Rule 4.2; *see also* MODEL CODE, *supra* note 1, at DR 7-104 (A) (1).

regardless of whether or not a party to a formal proceeding.[11] Thus, access to prosecutors by informants may be limited if the prosecutor is fearful of incurring state ethics sanctions.[12] It is well established that an individual may waive his Fifth and Sixth Amendment Rights to counsel as long as "the waiver is made voluntarily, knowingly, and intelligently."[13] However, an attorney may not waive his or her ethical duties nor may these duties be vicariously waived.[14] Moreover, a defendant could retain an attorney and "announce to federal and state prosecutors that he was represented by counsel with regard to all matters,"[15] thus preventing governmental operatives from eliciting statements from him.[16]

Additionally, corporations and organizations are often represented by counsel.[17] During an investigation, a prosecutor may contact employees of an organization to glean general information.[18] If the organization has retained counsel, what then is the width of the shield cast by counsel in protecting employees of an organization from *ex parte* contacts?[19] Thus, applying the no-contact rule to federal prosecutors and judge advocates could impede the

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[11] MODEL RULES, *supra* note 1, at Rule 4.2, cmt. The comment to Model Rule 4.2 states that the Rule pertains to "any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." *Id.* It should be noted that the comment that accompanies each rule "explains and illustrates the meaning and purpose of the Rule." *Id.* A comment to a rule of professional conduct is "intended as [a] guide. . . to interpretation, but the text of each rule is authoritative." *Id.*

[12] 59 Fed. Reg. 39,921 (1994). See supra note 8 and accompanying text (discussing the "fearful defendant" situation).

[13] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[14] *See infra* notes 58-62 and accompanying text.

[15] Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 701 (1992).

[16] *Id.* Professor Karlan notes that numerous FBI agents have protested the protectionist shield cast by corporate counsel's claims to represent all employees regarding any and all subjects that may fall within the employees' scope of employment. *Id.* at 701 n.137.

[17] *See* 59 Fed. Reg. 39,924 (1994) (discussing contacts with organizational employees).

[18] *Id.*

[19] *Id.* "It is not uncommon for federal prosecutors to encounter attorneys who assert that they represent every individual in a large corporation or organization." *Id.*

investigations of complex crimes which involve organizations and/or corporations.[20]

This Article first explores the potential pitfalls faced by federal prosecutors[21] and judge advocates[22] who are subject to two ethical sets of rules. The Article then examines the basic restrictions on attorneys' *ex parte* communications with parties to litigation who are represented by counsel. The Article also will evaluate various provisions of the final, promulgated rule (often referred to as the "Reno Rule")[23]. The Article concludes that the rules regarding *ex parte* contact with represented persons should not apply prior to an indictment, regardless of whether an ethical rule refers to a "person" or "party." Finally, the Article concludes that the Reno Rule validly and correctly protects federal prosecutors, whether civilian or military, from sanctions levied as a result of an alleged improper investigation or prosecution.

II. BACKGROUND: THE COMING STORM

In 1989, Attorney General Dick Thornburgh authorized Department of Justice (DOJ) attorneys to ignore the restrictions imposed by the Model Rules and Model Code regarding contacts with parties to litigation.[24] This

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[20] Karlan, *Supra* note 15, at 701. Professor Karlan examines the trend of "relational" representation by defense attorneys and argues that this type of representation has led to a curtailing of defendants' rights as the courts attempt to "curtail the reach of right to counsel protections." *Id.* at 670. She advises courts to ensure that this trend against relational representation does not overshadow and outweigh the interest society has in a fair criminal process for defendants. *Id.* at 723-24.

[21] Federal prosecutors must be members in good standing of state bars, yet also look to the Reno Rule for ethical concerns.

[22] *See supra* note 2 and accompanying text (discussing ethical conduct standards of judge advocates).

[23] *See infra*, notes 34-36 and accompanying text.

[24] *See, e.g.*, Tom Watson, *Thornburgh Memo has Defense Bar Up in Arms,* MANHATTAN LAW, Oct. 3, 1989; *see also* Tom Watson, *AG Decrees Prosecutors May Bypass Counsel; Move is Assault on Ethics Codes, Defense Bar Claims,* LEGAL TIMES, Sept. 25, 1989.

authorization, termed the "Thornburgh Memorandum,"[25] was vilified by members of the American Bar Association[26] and the defense bar.[27]

The Thornburgh memorandum was prompted by the case of *United States v. Hammad*,[28] where the Second Circuit Court of Appeals held that an informant's contact with a represented suspect might violate the anti-contact rule.[29] In *Hammad*, federal prosecutors created a false subpoena and used it in an attempt to obtain incriminating statements from a represented suspect prior to the suspect's indictment.[30] The Second Circuit held that the prosecutor violated DR 7-104(A)(1), reasoning that the informant was the "alter ego" of the prosecutor and thus should not have engaged in *ex parte* communications.[31]

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[25] *See* Memorandum from Attorney General Dick Thornburgh to All Justice Department Litigators, June 8, 1989 [hereinafter Thornburgh Memorandum] (standard procedure of the Department is to bring the "subject" seeking access to the prosecutor or the investigators before the court [which will] . . . prote[ct] the interest of the individual in providing him . . . the benefit of legal advice while not triggering any dire consequences from advertising his or her cooperation"). For purposes of this Article, the final, promulgated rule that is the subject of this work shall hereinafter be referred to as the "Reno Rule."

[26] ABA MIDYEAR MEETING, Rep. No. 301 at 8-9 (1990). The ABA will "oppose any attempt by the Department of Justice unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers under applicable rules. . . [where] they practice").

[27] *See* Jerry E. Norton, *Ethics and the Attorney General*, 74 Judicature 203, 207 (1991); William Glaberson, *Thornburgh Policy Leads to a Sharp Ethics Battle*, N.Y. TIMES, March 1, 1991, at B4. Attention came from other, more colorful commentators as well. *See* Hunter S. Thompson, *Fear and Loathing in Elko*, ROLLING STONE, Jan. 23, 1991 at 24, 56 (Attorney General Thornburgh "declared that his boys--4000 or so Justice Department prosecutors--were no longer subject to the rules of the Federal Court System").

[28] 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 111 S.Ct. 192 (1990).

[29] United States v. Hammad, 858 F.2d 834, 840-41 (2d Cir. 1988), cert. denied, 111 S.Ct. 192 (1990). Also, the *Hammad* court held that suppression of certain items of evidence might be an appropriate remedy for such a violation. *Id.*; *see also* Nancy J. Moore, Symposium: *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 519 (1992) (citing Case Comment generally).

[30] *Hammad*, 858 F.2d at 835-36.

[31] *Id.* at 839.

Furthermore, the court noted that violation of DR 7-104(A)(1) could result in the suppression of evidence obtained from such communications.[32]

Faced with the possibility of such drastic consequences, a proposed rule was issued by the Department of Justice to give prosecutors additional freedoms regarding contacts with represented persons, but was later withdrawn.[33] DOJ then issued a modified proposed rule on March 3, 1994.[34] After accepting comments on the rule, the Reno Rule was promulgated on August 4, 1994.[35] The primary significance of this rule, and the significant issue to the defense bar, is DOJ's statement that its attorneys are not bound by state ethics regulations.[36]

Even after the rule's enactment, the controversy surrounding the rule did not subside. The American Bar Association, seemingly determined to have the last word regarding the dispute, amended Model Rule 4.2.[37] Model Rule 4.2 has, until August of 1995, prohibited lawyers from contacting represented "parties."[38] DR 7-104 still provides for a similar prohibition.[39] However,

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[32] *Id.* The court found that in this case, exclusion was not warranted since the area of law was "previously unsettled[.]" *Id.* at 840.

[33] Daniel Wise, *Clinton Administration Embraces Thornburgh Memo*, N.Y.L.J., August 8, 1994. In July 1993, the Department of Justice issued another proposed rule, that was nearly identical to the Thornburgh memo. 59 Fed. Reg. 39,976 (1993). The rule encountered vigorous opposition and was withdrawn as well. *Id.*

[34] 59 Fed. Reg. 10,087 (1994). This version of the Reno Rule is "substantially the same" as the final version that was promulgated on August 4, 1994. 59 Fed. Reg. 39,910 (1994).

[35] 59 Fed. Reg. 39,910 (1994) (discussing the various incarnations of the final, promulgated rule).

[36] *Id.*

[37] Formal Opinion 95-396 of the ABA's Committee on Ethics and Professional Responsibility, was prompted, according to the Committee itself by the controversy surrounding adoption of the Reno Rule. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

[38] MODEL RULES, *supra* note 1, at Rule 4.2. Model Rule 4.2, until August 8, 1995, provided that "in representing a client, a lawyer shall not communicate about the subject of the representation with a *party* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id.* (emphasis added).

on August 8, 1995, the American Bar Association House of Delegates amended Model Rule 4.2 to prevent contacts of represented "persons" instead of "parties."[40]

Although appearing facially as an innocuous change, the consequences of the alteration are potentially far-reaching to judge advocates and federal prosecutors. Typically, a "party" is one directly involved in a controversy or claim,[41] while a "person" typically means "any individual or organization."[42] Thus, as is made clear by the notations to the Model Rules, Model Rule 4.2 applies whether or not the represented individual is a formal "party" to a proceeding.[43] Model Rule 4.2, as newly amended, is in direct conflict with the recently promulgated Reno Rule regarding federal prosecutors' contacts with represented persons.[44] Furthermore, the newly amended rule is in conflict with nearly, if not all, states' bar rules, of which judge advocates are members. Judge advocates previously were able to look to their military ethical standards in relative comfort,[45] knowing that the high court of their respective states promulgated essentially the same restrictions as the military. The newly

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[39] MODEL CODE, *supra* note 1, at DR 7-104(A)(1). DR 7-104 provides:

> "(A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Id.

[40] MODEL RULE, *supra* note 1, at Rule 4.2 n.12.

[41] *Black's Law Dictionary* defines "Party" as "[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A 'party' to an action is a person whose name is designated on record as plaintiff or defendant." BLACK'S LAW DICTIONARY (6th ed. 1990).

[42] 28 C.F.R. § 77.3(g) (1995). *See also* BLACK'S LAW DICTIONARY 1122 (6th ed. 1990) (defining "person" as a human being).

[43] MODEL RULES, *supra* note 1, at appendix A.

[44] *Compare* MODEL RULES, *supra* note 1, at 4.2 with 28 C.F.R. § 77.7 (1995).

[45] This comfort is indeed relative, as Col. Albertson, *supra* note 2 at 335, has pointed out. Service attorneys may be licensed in one of up to fifty-four jurisdictions, and thus subject to fifty-four different interpretations of the same ethical standard. *Id.*

amended rule eliminates that comfort, admittedly on a limited[46] level. While no provision has been proposed for judge advocates,[47] rules exist that would grant the more favorable interpretation of the anti-contact rule to military attorneys.[48] For instance, consider the situation where a judge advocate finds that a rule adopted by the Judge Advocate General Corps (JAGC) conflicts with a rule of a state where the judge advocate is licensed. The judge advocate should follow the rule adopted by the JAGC.[49] By doing so, the judge advocate is technically in violation of his state ethical standards (should state high courts choose to mirror the new Model Rule), and may be subject to discipline.[50] If states follow the new Model Rule, one way for the judge advocate to avoid any worry would be to follow the more restrictive ethical standard, albeit at the potential cost of having an investigation hamstrung.[51]

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[46] While Model Rule 4.2 has been newly amended and promulgated, it remains to be seen if state high courts will amend their versions of Rule 4.2 to reflect the change.

[47] Obviously, a potentially useful proposal would be for the Judge Advocate General to propose and promulgate ethical rules that mirror the provisions of the Reno Rule, 28 U.S.C. § 77 (1995). That proposal, and its justification, warrant more discussion than space allows in this Article.

[48] *See, e.g.*, JAGINST 5803.1A, Rule 8.5 (13 July 1992); AR 27-26, Rule 8.5.

[49] JAGINST 5803.1A, Rule 8.5 (13 July 1992). The comment to this rule notes that the Navy's instructions regarding the professional conduct of its judge advocates "are regarded as superseding any conflicting rules applicable in jurisdictions in which the judge advocate may be licensed." *Id.* However, a judge advocate who practices in a state or federal *civilian* court proceeding is to "abide by the rules adopted by that state or federal civilian court during the proceedings." *Id.*

[50] *See* John Jay Douglass, *The Nineteenth Annual Kenneth J. Hodson Lecture: Military Lawyer Ethics*, 129 MIL. L. REV. 11, 14 (1990). Dean Douglass cautions military lawyers of the dangers of dual allegiance, at least in an ethical sense, as follows:

> Military Lawyers must bear in mind that they are also subject to the disciplinary rules of the jurisdiction in which they are licensed to practice. Obviously there will be occasions when the rules or the states' interpretation of them conflict or at least vary from Army Rules. Military lawyers could face a contradiction in appropriate action. Though the Army rules state that [they] will supersede those of the state, *the state grievance board could well take a contrary view.*

Id. at 14-15 (internal citations omitted) (emphasis added).

[51] *See* Maj. Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1 (1989) (suggesting that if a difference of substance exists, "an Army attorney can usually avoid violating an ethical standard by following the rule with the most restrictive standard").

Whereas Model Rule 4.2 makes an allowance for *ex parte* communications that are "authorized by law," the committee comment to Model Rule 4.2 asserts that the Model Rule's allowance for such communications applies only at the pre-indictment stage.[52] This amendment of Model Rule 4.2 has rekindled the dispute surrounding the anti-contact rule in civil contexts, and even more in criminal ones, this time from angry prosecutors. However, in the "Crime Bill of 1995," which as of this writing is still in committee,[53] language has been inserted that will exempt federal prosecutors from state ethical standards.[54] Thus, while the drafters of the Model Rules have spoken, more will likely be heard from the Department of Justice and the legislative branch of the United States government, as the struggle for ethical supremacy and ensuing storm of controversy continue.

III. MODEL RULE 4.2 AND DR 7-104: REQUIREMENTS AND SCOPE

A. *The Requirements of Model Rule 4.2 and DR 7-104*

The anti-contact rule has traditionally been a fixture in Anglo-American legal ethics.[55] The rule's early roots may be traced back as far as 1836, where a treatise that espoused much the same view was recognized as authoritative.[56]

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[52] MODEL RULES, *supra* note 1, at Rule 4.2, cmt.

[53] 1995 Bill Tracking S.3; 104 Bill Tracking S.3, Violent Crime Control and Law Enforcement Improvement Act of 1995. *See* LEXIS, GENFED library, BILLS file (noting referral to Senate Judiciary Committee, and last action taken on Mar. 25, 1996). As of March 25, 1996, the bill, sponsored by Senator Dole had 13 cosponsors: Abraham, D'Amato, DeWine, Faircloth, Gramm, Hatch, Kyl, Lott, Santorum, Simpson, Smith, Thurmond, and Warner. *Id.*

[54] *See Id.* proposed section 502 (specifying that Federal rules of conduct adopted by the Attorney General shall govern the conduct of prosecutions in Federal court). 141 CONG. REC. S81 (daily ed. January 4, 1995) (statement of Sen. Dole). For discussion on the merits of this provision, see William G. Otis, *Prosecutors on Trial*, WASH. POST, May 30, 1995, at A13 (pro), and Gerald H. Goldstein, *Government Lawyers: Above the Law?*, WASH. POST, May 2, 1995, at A19 (con).

[55] *See Moore*, *supra* note 29, at 519 n.24.

[56] *Id.*; 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY ADDRESED TO STUDENTS AND THE PROFESSION GENERALLY 771 (2d ed. Baltimore, 1836), *quoted in* John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683, 684 n.6 (1979). For a study of the history of the anti-contact rule, see

The language of Model Rule 4.2 and DR 7-104 have been reproduced above.[57] The net they cast is both strong and difficult to avoid. Escaping the provisions of the anti-contact rule is most difficult for prosecutors and judge advocates. For instance, a prosecutor may not claim that a represented defendant has waived the prosecutor's ethical obligations, thereby permitting *ex parte* communications.[58]

In *United States v. Lopez*,[59] a represented defendant waived his right to counsel for the purpose of negotiating with the government, but retained counsel for other purposes.[60] The court held, however, that this did not serve to allow the prosecutor to engage in *ex parte* contact with the defendant because "ethical obligations are personal, and may not be vicariously waived."[61] The court rejected the DOJ's suggestion that local bar rules cannot be enforced against DOJ attorneys as "preposterous."[62]

Several cases have laid the foundation to support exempting military and civilian prosecutors, from the anti-contact rule, at least in certain situations.[63] In *United States v. Ryans*,[64] a defendant was charged with antitrust violations by attempting to restrain and suppress competition in the shipping business of household items of military personnel.[65] The DOJ Antitrust Division enlisted

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Lewis Kurlantzik, *The Prohibition on Communications with an Adverse Party*, 51 CONN. B.J. 136, 138-39 (1977).

[57] *See supra* note 3.

[58] United States v. Lopez, 4 F.3d 1455, 1462 (9th cir. 1993) (finding a violation of ethical rules, but refusing to dismiss indictment against the defendant).

[59] 4 F.3d 1455 (9th cir. 1993).

[60] *Lopez*, 4 F.3d at 1462. The defendant claimed that he waived his right to counsel only as it pertained to negotiations with a government attorney. *Id.*

[61] *Id.*; *see also* United States v. Partin, 601 F.2d 1000, 1005 (9th Cir. 1979) (ruling that prosecutor violated ethical standards even though the client initiated contact).

[62] *Lopez*, 4 F.3d at 1453-54.

[63] *See infra* notes 64-96 and accompanying text.

[64] 903 F.2d 731 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990).

[65] *Id.* at 732-33.

a suspected co-conspirator to tape conversations with several targets regarding the alleged price fixing.[66] The defendant moved to suppress evidence of the recorded conversations.[67] *Ryans* held that DR 7-104(A) did not apply to criminal proceedings prior to an indictment, even where the defendant was a target of an investigation.[68] The court noted that DR 7-104(A)(1) prohibited communications with a "party,"[69] and that a "party," strictly defined, is a person directly involved in the case.[70] The outcome would have likely been quite different had the new version of Model Rule 4.2 been in force at the time of the prosecution.

In stark contrast to *Ryans* is *United States v. Killian*,[71] which featured a represented defendant seeking to suppress evidence obtained while he was in custody. The court held that despite the defendant's custody and lack of indictment, he was still entitled to protection against *ex parte* contacts from a prosecutor.[72]

The landmark case of *Edwards v. Arizona*,[73] featured a defendant who was held and questioned until he stated that he wanted an attorney, whereupon all questioning ceased.[74] The next day, investigators again questioned the

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[66] *Id.* at 733. The co-conspirator agreed to cooperate with the Department of Justice in exchange for immunity from prosecution. *Id.*

[67] *Id.*

[68] *Id.* at 739-40 (disagreeing with *Hammad* case and making distinction between "persons" as those unrepresented by counsel, and "parties" as litigants or others directly involved in the process or outcome of a case).

[69] Ryans, 903 F.2d 739 (quoting MODEL CODE, *supra* note 1, at DR 7-104(A)(1)).

[70] *Ryans*, 903 F.2d at 739.

[71] 639 F.2d 206 (5th Cir. 1981) (holding that prosecution is precluded from *ex parte* contacts with the defendant, despite the absence of an indictment).

[72] Id. at 210 (noting that prosecutor's conduct was "highly improper" and "unethical"). *See also* United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990) (warning U.S. attorneys against breaching the anti-contact rule as a violation of the attorney-client relationship).

[73] 451 U.S. 477 (1981).

[74] *Id.* at 478-79.

defendant, who voluntarily made incriminating statements.[75] The Court suppressed the confession, holding that although voluntary, a prosecutor may not interrogate a defendant without counsel present unless the defendant has initiated the contact.[76] This case is paramount in Sixth Amendment right to counsel jurisprudence, in that it holds that once a suspect invokes his right to counsel, no further contact by law enforcement may take place until the suspect meets with counsel.[77]

Military Rules of Evidence (MRE)[78] Rules 301-321 represent a bid by the drafters to codify the Fourth, Fifth, and Sixth Amendment rights of the accused.[79] Admissibility of statements of an accused (without counsel present) in the military context is thus often viewed in terms of the MRE. Such example is the case of *United States v. Sager*.[80] In *Sager*, the accused hired a civilian lawyer before charges were filed.[81] He then notified military investigators that he had hired counsel for representation regarding certain civilian charges.[82] The United States Court of Appeals for the Armed Forces, citing *McNeil v. Wisconsin*[83], spurned the accused's contention that the hiring amounted to an objective manifestation of desire to deal with authorities only through counsel.[84]

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[75] *Id.* at 479.

[76] *Id.* at 484-86. However, a meeting between a prosecutor and a represented person is only permissible after a defendant has executed a "knowing and intelligent" waiver of his Sixth Amendment right to counsel. *See* Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938) (whether there is a waiver is dependent upon the particular facts and circumstances of the case).

[77] *Edwards*, 451 U.S. at 484-86.

[78] The author sincerely hopes that readers will find any discussion of MREs in the evidentiary sense more palatable than MREs of another kind.

[79] *See generally* MANUAL FOR COURTS - MARTIAL, (1995 edition), United States, MIL. R. EVID. 301-21 (as amended 1994).

[80] 36 M.J. 137 (C.M.A. 1992).

[81] *Id.* at 140.

[82] *Id.* at 144.

[83] 501 U.S. 171 (1991).

[84] *Sager*, 36 M.J. at 144-45.

One of the more famous cases regarding the ability of investigators to question a defendant, *Davis v. United States*[85], has roots in the Navy-Marine Corps Court of Military Review. In *Davis*, the accused initially waived his Fifth Amendment right to remain silent and Sixth Amendment right to counsel.[86] However, after approximately ninety minutes into his questioning, the defendant stated, "[m]aybe I should talk to a lawyer."[87] After further discussion with investigative agents, the defendant reversed himself.[88] The *Davis* Court, in a five to four decision, ruled that while the reference to an attorney was ambiguous, the investigators were not required to ask clarifying questions.[89]

The defendant in *United States v. Lincoln*,[90] was initially a target of an investigation, and only subsequently became an actual "party." The accused moved to have his confession suppressed after giving statements to an agent of the Naval Criminal Investigative Service (NCIS).[91] At the time of the accused's interrogation, MRE 305(e) provided that when an investigator, judge advocate, or anyone who is required to give Article 31(b) warnings intends to question a suspect and knows or should know that the suspect has counsel (either appointed or retained) with respect to that offense, the counsel must be notified of the intended investigation and given an opportunity to attend before the interrogation may proceed.[92] However, in *Lincoln*, the accused, by his own admission had not retained an attorney nor had one been appointed. Moreover,

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[85] 114 S.Ct. 2350 (1994).

[86] *Id.* at 2353.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 2352.

[90] 40 M.J. 679 (N.M.C.M.R. 1994).

[91] *Id.* at 682-83.

[92] But See Exec. Order No. 12936, 60 Fed. Reg. 26,647 (1995). It should be noted that MRE 305 (e) has been amended to remove the attorney notification requirement. *See also* United States v. McOmber, 1 M.J. 380 (CMA 1976).

the defendant was not in custody and expressly waived his right to counsel.[93] The confession was therefore not suppressed.[94]

Finally, of interest is the precarious notion that the "per se involuntary" rule of *McOmber*[95] does not apply to anticipatory attorney-client relationships.[96] It should be noted that the case of *U.S. v. LeMasters*[97] questions the continued validity of *McComber*.

B. *Model Rule 4.2 and DR 7-104 as Applied to Ex Parte Contacts of Organizational Employees, Prior to the Enactment of the Reno Rule*

At this point, the ethical duties of judge advocates and federal prosecutors diverge. The discussion to follow is particularly appropriate for judge advocates, as the current body of common law regarding *ex parte* contacts of organizational employees still applies to them. As federal prosecutors are now bound by the Reno Rule, codified standards now exist. These will be discussed *infra*.

The majority rule regarding organizational employees is that former employees and some current employees are not within the purview of protection of a corporate attorney.[98] In *Brown v. St. Joseph County*,[99] the attorney for the plaintiff contacted a former employee of a hospital concerning the material facts of the instant case.[100] Counsel for the

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[93] *Lincoln*, 40 M.J. at 691.

[94] *Id.* at 679.

[95] 1 M.J. 380 (C.M.A. 1976) (holding that statements taken from accused after notice of representation makes statements involuntary).

[96] United States v. Littlejohn 7 M.J. 200 (C.M.A 1979). Military prosecutors should be cautious in such situations, as only one Judge found this holding, with one other Judge concurring in the result only.

[97] United States v Lemasters, 39 M.J. 490 (C.M.A. 1994).

[98] *See infra* notes 97-168 and accompanying text (surveying cases, ABA Formal opinion, and Model Rule Comment).

[99] 148 F.R.D. 246 (N.D.Ind. 1993).

[100] *Brown*, 148 F.R.D. at 246, 248 (holding that the anti-contact rule has no application to former employees of an organization).

defendant called for the plaintiff's counsel to withdraw or be dismissed for violating ethical rules regarding contact with represented parties.[101] The court held that contacts with former employees are permissible.[102] The court reasoned that former employees have no relationship to a corporate party.[103] The court also stated that contact with current employees may be permissible if the employee is not one with managerial responsibility, is not one whose act could be imputed to the organization, or is not one whose statement may constitute an admission on the part of the organization.[104]

In 1990, however, the United States District Court for the District of New Jersey held that the definition of "party" under Model Rule 4.2 included both current and former employees of a corporation, thus preventing all *ex parte* contact by attorneys.[105] However, this decision has been both

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[101] *Id.* at 247-48. *See* also MODEL RULES, *supra* note 1, at Rule 4.2 cmt. Although Model Rule 4.2 itself does not define which employees of an organization should be considered represented parties, the drafters provided the following in a comment:

> [i]n the case of an organization, the Rule prohibits communication by a lawyer for one party concerning the matter in representation [1] with persons having a managerial responsibility on behalf of the organization, and *with any other person*, [2] whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability, or [3] whose statement may constitute an admission on the part of the organization.

Id. (emphasis supplied).

[102] *Id.* at 250-53.

[103] *Id.*

[104] MODEL RULE, *supra* note 1, at Rule 4.2.

[105] 105 Public Service Electric & Gas Co. v. Associated Electric & Gas Insurance Services, Ltd., 745 F.Supp. 1037, 1042 (D.N.J. 1990) ("AEGIS") (ruling that no *ex parte* contacts of either current or former employees are permissible under ethical rules of conduct).

criticized and distinguished.[106] Indeed, it appears that this case is an anomaly, since its holding has not been followed.[107]

Courts have adopted numerous tests to determine whether a member of an organization involved in a legal matter may be contacted by opposing counsel on an *ex parte* basis.[108] However, the comment to Model Rule 4.2 is unclear as to whether the reference to "any other person" applies to former as well as current employees.[109] There has been a great deal of scholarly review of the various tests used by courts to determine whether an organizational employee could be considered an agent of a represented corporation.[110]

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[106] *See, e.g.*, Curley v. Cumberland Farms, Inc., 134 F.R.D. 77 (D.N.J. 1991) (rejecting holding of AEGIS case as overly broad); *see also* Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991) (holding that ethical rules allow counsel to interview former corporate employees of adverse party to litigation); Goff v. Wheaton Industries, 145 F.R.D. 351 (D.N.J. 1992) (allowing interviews with multiple former employees of corporate adversary).

[107] Michael A. Stiegel, *Ex Parte Communication When a Corporate Litigant is Involved*, CORP. COUNS. Q., Jan. 1992 at 4. (discussing AEGIS case and characterizing its holding as an anomaly).

[108] *See infra* notes 111-137 and accompanying text (discussing tests employed and cases where tests were used).

[109] MODEL RULES, *supra* note 1, at Rule 4.2, cmt.

[110] *See, e.g.*, Stephen M. Sinalko, Note, *Ex Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U. L. REV. 1456 (1991)(reviewing various tests employed by courts regarding permissibility of *ex parte* contacts); Jerome N. Krulewitch, Comment, *Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest*, 82 NW. U. L. REV. 1274, 1286-97 (1988) (reviewing tests employed and arguing that the alter ego test is the most fair); Samuel R. Miller & Angelo J. Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is it Ethical?*, 42 BUS. LAW. 1053 (1987) (reviewing tests).

C. *Tests Used by Courts Regarding the Definition of "Party"*

Some courts and bar associations have applied the "control group"[111] test, which allows an attorney to contact any employee of a corporation that is a party to the litigation.[112]

The Supreme Court, however, has criticized this approach as providing inadequate protection to the attorney-client privilege.[113] In *Upjohn Co. v. United States*,[114] the general counsel for Upjohn discovered questionable payments made by foreign subsidiaries to foreign governmental officials.[115] After an internal investigation, which entailed sending questionnaires to foreign managers, the general counsel interviewed selected employees of the company.[116] After notifying the IRS of the situation, the IRS attempted to discover the counsel's notes.[117] The Court ruled such communications were protected by attorney-client privilege.[118] This ruling extended traditional protections of attorney-client privilege beyond that of managers in a corporation's control group.[119] Some courts have viewed the

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[111] *See* Krulewitch, *supra* note 110, at 1286.

[112] *See* Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc., 471 N.E.2d 554, 561 (Ill.App. 2 Dist. 1984) (employing control group test as best method to give parties protections of anti-contact rule, but still insuring that information is made available to such parties); *see also* HAZARD & HODES, *supra* note 1, at § 4.2:101 at 734 (2d ed. 1990).

[113] Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) (rejecting the control group test in the context of attorney-client privilege).

[114] *Id.*

[115] *Id.* (holding that lower level employees of a corporation may be considered clients, under the protection of the attorney-client privilege, if their communications to Upjohn's counsel were meant to aid counsel in his representation of the company).

[116] *Id.*

[117] *Id.*

[118] *Id.* at 383.

[119] *Id.*

Court's opinion in *Upjohn* as an outright rejection of the control group test.[120]

A separate approach to *ex parte* communications is the "binding-admission"[121] theory.[122] This approach prohibits *ex parte* communication with corporate employees who possess the capacity to bind the corporation.[123] Such an employee may bind a corporation when (1) policy decisions are made during litigation, or (2) if the employee's out-of-court statements are classified as evidentiary admissions of the corporation.[124] The official comment to Model Rule 4.2 explicitly prohibits *ex parte* contacts with corporate employees who fall into either of these two categories.[125]

A variation of the binding-admission theory prohibits communications without counsel only with employees whose statements constitute evidentiary admissions under Federal Rule of Evidence 801(d)(2)(C).[126] This variation, termed the "Managing-Speaking-Agent test,"[127] applies the prohibition only to employees who have the legal

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[120] *See* Admiral Ins. v. U.S. Dist. Court for Dist. of Ariz., 881 F.2d 1486, 1492 (9th Cir. 1989)(rejecting control group test). *See also* Morrison v. Brandeis Univ., 125 F.R.D. 14, 16-18 (D. Mass. 1989)(choosing a case by case test in favor of the control group test); Chancellor v. Boeing Co., 678 F.Supp. 250, 253 (D. Kan. 1988)(rejecting the control group test for the managing-speaking agent test). Notably, the Court in *Upjohn* did not address the issue regarding whether counsel could approach the employees of Upjohn without notice to Upjohn's counsel. *See generally*, Louis A. Stahl, *Ex Parte Interviews With Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181 (1987).

[121] Sinalko, *supra* note 110, at 1484 (1991) (discussing the binding-admission approach in determining if *ex parte* contacts are permissible).

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Sinalko, *supra* note 110, at 1484. Fed. R. Evid. 801(d)(2)(C) states that "[a]" statement is not hearsay if the statement is offered against a party and is a statement by a person authorized by the party to make a statement concerning the subject." Fed. R. Evid. 801(d)(2)(C).

[127] Sinalko, *supra* note 110 and accompanying text.

authority to bind the corporation in a legal evidentiary sense.[128] Another variation, termed the "Scope of Employment test,"[129] examines the capacity of corporate employees to make out of court statements that are binding on the corporation as evidentiary admissions, and is thus much like Federal Rule of Evidence 801(d)(2)(D).[130]

Two other tests that are sometimes applied are the "balancing test," which determines the propriety of *ex parte* contacts on a case by case basis,[131] and the "blanket test," which prohibits all *ex parte* communication.[132] The balancing test was recently used in the case of *Morrison v. Brandeis University*,[133] where the plaintiff's counsel was authorized to conduct *ex parte* interviews of university employees.[134] The court reasoned that the interests of each side on the basis of the facts and circumstances of the case are of critical import and that a universal test should not be followed.[135] While the blanket test's simplicity may be desirable for its clarity,[136] few courts have adopted this approach, and others that once followed it have rejected it.[137]

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[128] Wright v. Group Health Hospital, 691 P.2d 564, 569 (Wash. 1984).

[129] *See* Sinalko, *supra* note 110 and accompanying text.

[130] Fed. R. Evid. 801(d)(2)(D). Fed. R. Evid. 801(d)(2)(D) states that an admission by a party opponent is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency made during the existence of the relationship. *Id.*

[131] *See, e.g.* Morrison v. Brandeis Univ., 125 F.R.D. 14, 18 (D. Mass. 1989).

[132] Public Service Electric & Gas Co. v. Associated Electric & Gas Insurance Services, Ltd., 745 F.Supp. 1037, 1042 (D.N.J. 1990).

[133] 125 F.R.D. 14 (D. Mass.) (1989).

[134] *Id.*

[135] *Id.* at 18 n.1.

[136] Neisig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990) (remarking that the blanket test's "single indisputable advantage" is its clarity).

[137] *See* Public Service Electric & Gas Co. v. Associated Electric & Gas Insurance Services, Ltd., 745 F.Supp. 1037, 1042 (D.N.J. 1990) (following blanket rule). *But see also* Hewlett-Packard Co. v. Superior Court, 205 Cal. App.3d 43 (1988) (rejecting blanket rule).

D. ***Organizational Employee Contacts by Federal Prosecutors***

According to the Reno Rule, federal attorneys are generally prohibited from communicating with current employees of a represented organization who participate as "controlling individual[s]," while *ex parte* contacts of former employees are generally permitted, as long as other safeguards specified in the new regulations are followed.[138] A "controlling individual" is deemed to be a current employee or member of the organization holding a high level position with the organization, participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter and is known by the government to be engaged in such activities.[139] This standard has been characterized as an extremely narrow version of the control group test.[140] This characterization may be viewed as a fair assessment of the Reno Rule standard, as indeed, on its face, the standard would seem to apply only to those employees who are in a controlling group within the organization, e.g., corporate officers, or legal/policy decision makers.[141]

If *ex parte* communication is allowed, attorney conduct is controlled by additional provisions of the Model Rules and Model Code.[142] In *McCallum v. CSX Transportation*, Inc.,[143] a railroad transportation corporation was sued by a minor who had been struck by a steel band hanging from a railroad car.[144] CSX Transportation filed a motion for

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[138] 28 C.F.R. § 77.10(a) (1995) (discussing the definition of a controlling individual under the Reno Rule); 28 C.F.R. §§ 77.10(b)-(c) (1995) (discussing former organization employee contacts).

[139] *Id.*

[140] Alafair S.R. Burke, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635, 1667 (1994) (arguing that federal prosecutors should be subject to a single uniform ethical standard, but noting that the Reno Rule is overbroad).

[141] *Compare* 28 C.F.R. part 77.10(a) (1995) (Justice Department definition of a controlling individual) with Upjohn Co. v. United States, 449 U.S. 383 (1981) (discussing control group test).

[142] MODEL RULES *supra* note 1, at Rule 4.3.

[143] 149 F.R.D. 104 (1993).

[144] McCallum v. CSX Transportation Inc., 149 F.R.D. 104, 105 (M.D.N.C. 1993).

sanctions and a protective order against counsel for the plaintiff after discovering that plaintiff's counsel and an investigator had engaged in *ex parte* communication with current employees of CSX who had witnessed the accident.[145] The *McCallum* court held that the communications were indeed prohibited and warranted certain limited sanctions.[146] The court further stated that contact with an unrepresented witness might still be invalid if certain precautions were not followed.[147]

The rule applied by the *McCallum* court, Model Rule 4.3, requires an attorney to convey to the unrepresented witness the truth about the lawyer's role, his representative capacity, and the fact he is not disinterested.[148] Thus, on a practical level, an attorney who contacts an employee should "(1) fully disclose their representative capacity to the employee, (2) state the reason for seeking the interview as it concerns the attorney's client and the employer, (3) inform the individual of the right to refuse to be interviewed, (4) inform the person of the right to have their own counsel present, and finally (5) state that the attorney may not under any circumstances solicit attorney-client or work product information from the employee."[149] These requirements hold true for former employee interviews as well.[150]

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[145] *Id.* at 106.

[146] *Id.* at 113. The court held that the plaintiff would be prohibited from using any EX PARTE statement given by a CSX employee as evidence at trial. *Id.* The court also issued a protective order prohibiting any further *ex parte* contact. *Id.*

[147] *Id.* at 112-13. The court looked to Model Rule 4.3 in delineating these precautions. *Id.* at 112.

[148] MODEL RULES *supra* note 1, at Rule 4.3.

[149] *McCallum*, 149 F.R.D. at 112. The court also noted that according to North Carolina Ethics Opinion RPC 81, a prospective interviewee must be willing to be interviewed before *ex parte* communications may commence. *Id.*

[150] In re Domestic Air Transportation, 141 F.R.D. 556, 560 (N.D.Ga. 1992) (Model Rule 4.3 precautions must be followed for both current and former organizational employee contacts by opposing counsel).

The majority rule in the federal circuits regarding *ex parte* contacts of former employees is stated in *Goff v. Wheaton Industries.*[151] *Goff* involved a former employee's action for age discrimination, and the plaintiff's attorney's attempt to contact fifty-five former employees of the defendant corporation.[152] The court held that contacting former employees on an *ex parte* basis was ethical.[153]

In *Cram v. Lamson & Sessions Co., Carlon Div.*,[154] plaintiff's counsel in an action for employment discrimination sought to interview former employees of the corporate defendant.[155] The defendant opposed the possible interviews, but the *Cram* court held that the interviews could proceed without any violation of ethical rules.[156] The court stated that "the majority of courts have similarly held that [Model Rule 4.2] does not apply to former employees and, therefore, does not restrict *ex parte* communications with *any* former employee."[157] The court was influenced by the official comment to Model Rule 4.2, which bars contact with any person whose act or omission might be imputed to the organization.[158] Despite the seemingly wide net cast by this language, the *Cram* court held that the comment was not intended to encompass former employees, but instead covered agents of an

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[151] 145 F.R.D. 351 (D.N.J. 1992). *See also infra* notes 161-168 (discussing ABA Formal Opinion and Model Rule comment).

[152] Goff v. Wheaton Industries, 145 F.R.D. 351 (D.N.J. 1992).

[153] *Id.*

[154] 148 F.R.D. 259 (S.D. Iowa 1993).

[155] *Id.* at 260 (noting that *ex parte* contact questions are "being raised with greater frequency").

[156] *Id.* at 259.

[157] *Id.* at 262 (emphasis in original).

[158] *Id.* at 263 ("The court concludes. . . that the interpretations of the Comment to Rule 4.2. . . does not prohibit *ex parte* communications with former employees"). *See also* MODEL RULES *supra* note 1, at Rule 4.2, cmt.

organization other than employees in the traditional sense.[159] Various other courts have held in similar fashion.[160]

In 1991, the ABA issued a Formal Opinion regarding contacts with former employees on an *ex parte* basis.[161] The ABA concluded that Model Rule 4.2 does not prohibit communications with former employees as long as the former employees are not represented by the corporation's counsel.[162] The opinion noted that while persuasive policy arguments exist for extending Model Rule 4.2 to cover some former employees, the text of the Rule does not do so, and the official comment gives no basis for concluding that a prohibition was intended.[163] Furthermore, the ABA committee opined that a blanket prohibition on acquiring information about a corporation from former employees would be too detrimental to litigation.[164]

Regarding current employees, the official comment to Model Rule 4.2 sets out three restrictions in defining which employees may be considered an organizational party under Model Rule 4.2.[165] Under the comment, an "organizational party" is defined as persons having managerial responsibility, those whose acts or omissions may be imputed to the organization for liability purposes, or individuals whose statements may constitute an admission by the organization.[166] Courts look to these restrictions in making their decisions regarding contacts with current employees.[167] These restrictions forbid

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[159] *Cram*, 149 F.R.D. at 263.

[160] *See, e.g.*, Polycast Technology Corp. v. Uniroyal Inc., 129 F.R.D. 621, 627 (S.D.N.Y. 1990)(permitting *ex parte* contacts of former employees of a corporation); *see also* DuBois v. Gradco Systems, 136 F.R.D. 341, 346 (D.Conn. 1991) (citing *Polycast*).

[161] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991).

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] MODEL RULES, supra note 1, at Rule 4.2, cmt.

[166] *Id.*

[167] *See, e.g.*, McCallum v. CSX Transportation, 149 F.R.D. 104, 109 (M.D.N.C. 1993) (citing the Model Rules and official comment).

informal discovery of those individuals who can hurt or bind an organization.[168]

III. ANALYSIS OF THE ANTI-CONTACT RULES--DO THEY APPLY TO FEDERAL PROSECUTORS AND/OR JUDGE ADVOCATES?

Model Rule 4.2 and DR 7-104 prohibit contacts by an attorney with a person (s)he knows is represented by counsel, except where such counsel has previously given approval for *ex parte* contact.[169] The rules do not distinguish between civil and criminal cases.[170] Prosecutors are not mentioned specifically in the text of the Model Rules relating to *ex parte* contact.[171] However, prosecutors are specifically mentioned in other sections of the Model Rules, such as Model Rule 3.8, entitled, "[The] Special Responsibilities of a Prosecutor[.]"[172] The comment to Model Rule 3.8 characterizes the prosecutor in a different light than that of other lawyers, noting that a "prosecutor has the responsibility of a minister of justice and **not** simply that of an advocate."[173] Thus, from the distinction within the

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[168] BROWN V. ST. JOSEPH COUNTY, 148 F.R.D. 246, 254 (N.D. Ind. 1993) (citing treatise of evidence).

[169] MODEL RULE, *supra* note 1, at Rule 4.2; MODEL CODE supra note 1, at DR 7-104(A)(1).

[170] *Id.* Indeed, various commentators have argued that these rules have no application whatsoever to criminal cases. *See, e.g.*, Marc A. Schwartz, Note, *Prosecutorial Investigations and DR 7-104(A)(1)*, 89 COLUM. L. REV., 940, 946 (1989) (DR 7-104 should have no application in criminal cases). *See also* H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV., 1137, 1179 (1987) (the drafters of the rule were only considering civil practitioners).

[171] *See* Uviller, *supra* note 170 at 1179.

[172] *See* MODEL RULES, *supra* note 1, at Rule 3.8 (noting that prosecutors have special responsibilities). Moreover, the Model Code also mentions prosecutors specifically under a separate provision. MODEL CODE *supra* note 1, at DR 7-103 (noting the standards for public prosecutors or other United States Government lawyers).

[173] MODEL RULES, supra note 1, at 3.8, cmt. (emphasis added). One author has suggested that while prosecutors should zealously act in the same manner as other lawyers, their position as "ministers of justice" actually requires them to see that defendants whose charges are not supported by probable cause should not be prosecuted. *See* Fred Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) (looking towards each stage of the criminal trial process, and examining the prosecutor's

rules themselves, it is both an inference and an explicit statement by which the drafters of the Model Rules and Model Code conclude that prosecutors are faced with unique circumstances and situations.[174] Thus, the omission of prosecutors by name, extrapolated out to relate to *ex parte* contacts, is the underpinning of the argument that prosecutors are exempt.

A. *Prosecutors Represent No Clients in a Strict Sense*

Model Rule 4.2 employs the phrase "[i]n representing a client."[175] Prosecutors, however, do not represent any client in a strict sense of the word, nor do they attempt to advance any pecuniary interest of the United States.[176] If anything, the closest a prosecutor comes to having a client is the state itself.[177] A prosecutor's main duty is to protect the public and to serve the interests of justice.[178] As long as a government attorney conducts and tries a case in a just manner, the United States is victorious no matter the verdict.[179] As noted by the Supreme Court, a government prosecutor must

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role of seeing justice done at each). For an interesting discussion of the balancing between different interests faced by a prosecutor, *see generally* Susan Brenner & James Durham, *Towards Resolving Prosector Conflicts of Interest*, 6 GEO J. LEGAL ETHICS 415 (1993).

[174] MODEL RULES, *supra* note 1, at Rule 3.8 The title of Model Rule 3.8 is "[s]pecial responsibilities of a prosecutor[.]" *Id.* In the text of the rule, the special responsibilities are specifically delineated as they pertain to prosecutors. *Id.* These responsibilities include refraining from prosecuting defendants whose charges are not supported by probable cause, making reasonable efforts to ensure that the accused has been advised of his right to counsel, ensuring that such a person has had an opportunity to obtain counsel, and avoiding any attempt to induce an unrepresented defendant to waive his pretrial rights. *See* MODEL RULES, *supra* note 1, at Rule 3.8(a)-(c).

[175] MODEL RULES, supra note 1, at Rule 4.2.

[176] *See* Uviller, *supra* note 170, at 1179.

[177] *See* Schwartz, *supra* note 170, at 947. (A prosecutor represents a client only insofar as the state may be deemed one).

[178] MODEL RULES, supra note 1, at Rule 3.8 cmt. (prosecutor is not an advocate, but is one who acts for justice and the public good). This point is forcefully demonstrated by words written on a wall at DOJ's Headquarters that state "[t]he United States wins its point whenever justice is done its citizens in Court." Douglas Letter, *Lawyering and Judging on Behalf of the United States: All I ask for is a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1299 (1993).

[179] Letter, *supra* note 178, at 1299.

act as a servant to the law, working toward dual goals--that the guilty not escape nor the innocent suffer.[180] Model Rule 4.2's presupposition of a "client"[181] in its language cannot be read too broadly, however. Assuming that the client of a prosecutor is the public as a whole, the defendant in a criminal case would inescapably be included. The logical inference is that a prosecutor has no client at all.[182] Therefore the phrase "[in] representing a client,"[183] contained in Model Rule 4.2 does not fit into the responsibilities of a prosecutor, since a prosecutor does not, per se, have a client.

B. *No Public Interest Is Served By Applying The Anti-contact Rule To Prosecutors*

The public interests protected by the anti-contact rule are missing in criminal cases. Justice White, dissenting in *Messiah v. United States*,[184] noted that the rule's general purpose is to counter the imbalance of legal skill and insight between the lawyer and the party litigant.[185] The public must be protected from "an unscrupulous attorney . . . [taking] advantage of an unsophisticated party,"[186] and society is further assured that lawyers are not preying on persons known to be represented by counsel.[187] Thus, the rule is based on the premise that an attorney may use his skills and his superior

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[180] Berger v. United States, 295 U.S. 78, 88 (1935) (discussing the role of a United States Attorney as one who must ensure the ends of justice are served in all cases).

[181] MODEL RULES, *supra* note 1, at Rule 4.2.

[182] This argument is explained forcefully by Professor H. Richard Uviller, *supra* note 170, at 1137, 1179-83 (1987). *Contra* Nancy J. Moore, *supra* note 29 at 515, 523 n.50 (1992) (prosecutors have never been portrayed as representing individual citizens).

[183] MODEL RULES, supra note 1, at Rule 4.2.

[184] 377 U.S. 201 (1964).

[185] *Id.* at 211.

[186] United States v. Guerrerio, 675 F. Supp. 1430, 1437 (S.D.N.Y. 1987)(noting that even though suppression is a necessary result of a constitutional violation, "the same result is not a foregone conclusion" where a prosecutor commits an ethical breach).

[187] United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986)(holding that the taping of a defendant's statements with his co-conspirators, after the government became aware that the defendant was represented by counsel, still did not constitute an ethical breach since no judicial proceeding against the defendant had commenced).

knowledge of the law to induce an unrepresented party to give damaging statements or accept an unfair settlement.[188]

There is an equally compelling public interest in assisting prosecutors in investigating and prosecuting alleged criminals.[189] Furthermore, there is a strong interest in prevention of future crimes.[190] Prosecutorial contact with law enforcement agents and informants, and represented individuals should be encouraged, as the public has an interest in evidence obtained by such agents' contact with suspects and criminal defendants.[191]

C. *The Interests Of Criminal Defendants Are Protected By Other Means*

Although there is a danger of a prosecutor using his or her power in an unethical manner to glean damaging evidence from (presumptively) an easily manipulated, unskilled, and unrepresented defendant, there are many protections that are available to any and all criminal defendants in the United States.[192] As interpreted by the Supreme Court, the Fifth and Sixth

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[188] *See* John Leubsdorf, *supra* note 56, at 683, 686 (1979) (stating that the rule is designed to protect unsuspecting parties from lawyers seeking an upper hand).

[189] *Cf.* Moran v. Burbine, 475 U.S. 412, 416 (1986) (the prosecutorial process must be supported by defendants' admissions of guilt--such admissions are essential to the compelling interests of society, i.e., punishing those who break the law).

[190] *Id.*

[191] *Id.*

[192] WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, 44-46 (2d ed. 1992). Professors LaFave and Israel note that no area of law receives more constitutional attention than criminal law; the Bill of Rights contains 24 separate rights due to individuals, and thirteen are "aimed specifically at the criminal justice process." *Id.* The professors note:

> [t]he Fourth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures, [provides for search warrants if] certain conditions are met. The Fifth Amendment. . . prohibits compelling [a defendant] to be a "witness against himself." The Sixth Amendment lists several rights applicable "in all criminal prosecutions"--the rights to a speedy and public trial, to a trial by an impartial jury of the state and district in which the crime was committed, to notice of the "nature and cause of the accusation," to confrontation of opposing witnesses, to compulsory process for obtaining federal witnesses, and to the assistance of counsel. . . [T]he Fifth Amendment subjects the criminal justice process, along with other legal processes, to its general prohibition against the deprivation of "life, liberty, or property" without "due process of law."

Id.

Amendments of the Constitution determine the extent that prosecutors may properly contact both represented and unrepresented individuals.[193] Prior to an indictment, a prosecutor or judge advocate cannot initiate *any* contact with a suspect who has invoked the right to counsel.[194] After an indictment, a prosecutor still cannot initiate contact with a represented defendant relating to the conduct in question, unless the defendant's counsel consents.[195] Moreover, a prosecutor or judge advocate cannot even engage in plea negotiations with a suspect or defendant unless the individual has actively and voluntarily asserted his constitutional right to represent himself.[196] Some courts have held that in light of the above rights and procedures available to *criminal* defendants, the anti-contact rule as an additional protection for defendants is inapplicable to prosecutors.[197]

The protective mechanisms available to a criminal defendant prevent prosecutors from preying on represented suspects and defendants. Indeed, as one court noted, "the purpose of the [anti-contact rule is] to assure *civil* litigants some of the protection from [the various dangers explained above] which the federal and state constitutions guarantee to criminal defendants."[198] Criminal suspects and defendants are already protected

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[193] *Id. See, e.g.*, Patterson v. Illinois, 487 U.S. 285 (1988) (postindictment questioning by prosecutor in absence of defense counsel does not violate the accused's Sixth Amendment right to counsel if accused executes a valid waiver of such right). Michigan v. Jackson, 475 U.S. 625 (1986)(all questioning of a defendant must cease after invocation of right to counsel). Edwards v. Arizona, 451 U.S. 477 (1981) and Miranda v. Arizona, 384 U.S. 436 (1966)(accused is entitled to be appraised of constitutional rights upon arrest and prior to interrogation).

[194] *Edwards*, 451 U.S. at 484-87. *See also* United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), *cert. denied,* 498 U.S. 885 (1990).

[195] *Jackson*, 475 U.S. at 636. If a suspect or defendant in custody has not invoked the right to counsel, a prosecutor must still obtain a voluntary waiver of this right after informing the individual that (s)he is entitled to counsel. *See Patterson*, 487 U.S. at 554-58 (post-indictment). *See also, Miranda*, 384 U.S. at 444-45 (pre-indictment).

[196] *See* FED. R. CRIM. P. 11(c)-(e).

[197] *See* State v. Nicholson, 463 P.2d 633, 636 (Wash. 1969) (holding that where defendant made statements voluntarily after consulting an attorney, anti-contuct rule would not apply). *See also* State v. Richmond, 560 P.2d 41, 46 (Ariz. 1976), *cert. denied*, 433 U.S. 915 (1977) (finding no violation of anti-contact rule where police officers acted without knowledge of prosecutors in obtaining statements from accused).

[198] *Nicholson*, 463 P.2d at 636 (emphasis added).

from dangers and abuses by the Constitution, so the anti-contact rule as applied to prosecutors should be considered unnecessary.

V. THE RENO RULE: MOTIVATIONS BEHIND ITS ENACTMENT, EVALUATIONS OF ITS PROVISIONS, AND PROPRIETY OF ITS CRITICISMS

A. *Motivation for the Reno Rule*

The purpose of the Reno Rule is to "impose a comprehensive, clear, and uniform set of regulations on the conduct of government attorneys during criminal and civil investigations and enforcement proceedings."[199] The Reno Rule is the product of three different proposed rulemakings and comment periods,[200] demonstrating the level of seriousness with which the Department of Justice viewed this area.[201]

The Reno Rule was enacted to clarify the manner in which prosecutors may operate during an investigation and to assist investigative agencies.[202] Sweeping application of the anti-contact rule in some jurisdictions may block techniques that some courts have held permissible under constitutional and statutory law, such as undercover agents or pre-indictment interviews.[203] Furthermore, prosecutors are chilled from

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[199] 59 Fed. Reg. 39,910 (1994) (discussing purposes behind and intentions of the Reno Rule).

[200] *See* 59 Fed. Reg. 10,086 (1994); 58 Fed. Reg. 39,976 (1993); and 57 Fed. Reg. 54,737 (1992).

[201] Comments received after the publication in November 1992 and July 1993 "resulted in major substantive changes" to the proposed rule. 59 Fed. Reg. 39,910 (1994). The final rule, according to the Department of Justice "reflects the Department's commitment to fostering ethical behavior consistent with the principles" of the anti-contact provision's of Model Rule 4.2 and DR 7-104. *Id.*

[202] 59 Fed. Reg. 39,911 (1994) ("[u]ncertainty about the scope and applicability of DR 7-104 [and] Model Rule 4.2. . . has directly affected the investigative activities of agents, including [the FBI and DEA].") Furthermore, prosecutors have decreased their activity in the investigative stages of cases in order to "leave federal agents unfettered" by state ethics rules meant for attorneys. *Id.*

[203] *See* 59 Fed. Reg. 39,911 (1994). The techniques used include preindictment interviews or undercover operations. *Id.*

engaging in such techniques because of the threat of disciplinary action.[204] Finally, the Reno Rule's creation was motivated by problems that were exacerbated when federal attorneys assigned to the same case were members of different state bars.[205] Prosecution teams might be admitted to different state bars, which might cause "uncertainty, confusion, and the possibility of unfairness"[206] in complying with ethical rules. Indeed, "one member of a two-member federal prosecution team could receive a commendation for effective law enforcement while the other member, licensed in a different state, might be subject to state discipline for the *same conduct*."[207] This is a real concern on the part of the DOJ, as private attorneys have asked courts to disqualify or discipline DOJ attorneys who engage in *ex parte* contacts.[208]

The DOJ decision appears to have been made based on the wording of the Model anti-contact rules themselves. Nearly all states have adopted the Model Rules, or their substantial equivalent.[209] These rules, however, also include an exception for communications "authorized by law."[210] It is the DOJ's position that "[t]his final rule, a duly promulgated regulation, is intended to constitute 'law' within the meaning of those exceptions."[211]

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[204] *Id.*

[205] *Id.* Federal law requires only that a DOJ attorney be a member in good standing of a state bar, but (s)he need not belong to the bar in each state where (s)he is practicing on behalf of the government. *Id.*

[206] *Id.*

[207] *Id.* (emphasis added).

[208] Harvey Berkman, *Thornburgh Memo Fallout Casts Shadow on Environmental Case*, NAT'L L.J., December 12, 1994, at A16 (disqualification motion by defense counsel of Assistant United States Attorneys). *See also* 59 Fed. Reg. 39,911 (1994) (recognizing that the uncertainty about the scope and applicability of Model Rule 4.2 and DR 7-104 has "directly affected" the effectiveness of agents and prosecutors). *Id.*

[209] 59 Fed. Reg. 10,087 (1994) (discussing pervasiveness of Model Rule 4.2 and DR 7-104).

[210] MODEL RULE, *supra* note 1, at Rule 4.2; MODEL CODE, *supra* note 1, at DR 7-104(A).

[211] 59 Fed. Reg. 39,911 (1994) (discussing introduction and background of rule, along with its major provisions).

A consideration regarding the promulgation of the Reno Rule is the DOJ's aggressive position that the rule has the authority to exempt DOJ attorneys from **any** anti-contact rule.[212] However, DOJ stated that in the interest of the principles behind the anti-contact rule, it decided not to "implement a wholesale exemption" to these rules.[213] The Department instead has attempted to fashion a rule that can marry the purposes of Model Rule 4.2 and DR 7-104 with the public's interest in effective, meaningful law enforcement.[214]

B. ***Basic Provisions of the Reno Rule***

On its face, the Reno Rule's general aim is to create a "narrow safe harbor that fits into the reality of today's law enforcement needs."[215] According to section 77.3 of the proposed Reno Rule, there is a distinction between represented "persons," "targets," and "parties."[216]

Generally, the Reno Rule allows *ex parte* contacts by DOJ lawyers with a represented person.[217] "A represented 'person' is an individual or organization that has not been arrested or named as a defendant in a criminal or civil proceeding."[218] This section of the Reno Rule is consistent with the language of and principles behind most states' versions of DR 7-104(a)(1), which prohibit *ex parte* contacts with 'parties', but not a "represented person."[219] Obviously, Model Rule 4.2, as newly amended, is in conflict

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[212] *Id.* (discussing long history of anti-contact rules as a factor considered in the Department's decision not to exempt its attorneys from any such rule).

[213] *Id.*

[214] *Id.* at 39,911-12.

[215] Daniel Wise, *Clinton Administration Embraces Thornburgh memo*, N.Y.L.J., Aug. 8, 1994, at 1.

[216] 59 Fed. Reg. 39,919 (1994) (discussing the differences between a represented person, a represented party, and a target of an investigation).

[217] 28 C.F.R. § 77.7 (1995). *Ex parte* communications are not limited to undercover investigations under this section. *Id.*

[218] *Id.*

[219] *See* 59 Fed. Reg. 39,910 (1994) (balancing principles of anti-contact rules with purposes behind Reno Rule).

with the Reno Rule. However, sections 77.8 and 77.9 of the Reno Rule prohibit contacts relating to plea negotiations or privileged communications, regardless of whether an agent of DOJ contacts a represented person.[220]

Furthermore, DOJ attorneys may only contact targets on an *ex parte* basis to determine if the target has counsel, or if the attorney is investigating an additional or different crime.[221] A DOJ attorney may also contact a target if the DOJ has a "good faith"[222] belief that the conduct is necessary to protect life or safety.[223] The Reno Rule specifically prohibits a DOJ attorney from contacting a represented "party"[224] without the permission of the party's counsel.[225]

Thus, the Reno Rule reasonably protects a citizen's rights and enables the prosecutor to act in an effective manner. As a matter of common sense, it is important that government attorneys have the ability to direct agents and friendly witnesses to contact represented persons during undercover investigations.[226]

Section 77.7 of the Reno Rule states that a DOJ attorney may communicate directly or indirectly with a represented *person*, unless the contact is otherwise prohibited by federal law.[227] However, these

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[220] 28 C.F.R. §§ 77.8-77.9 (1995) (delineating the circumstances in which a represented person may not be contacted on an *ex parte* basis by a federal prosecutor).

[221] 59 Fed. Reg. 39,918 (1994).

[222] 28 C.F.R. § 77.6(f) (1995) (articulating the threat to safety of life exception section of the Reno Rule).

[223] *Id.*

[224] 28 C.F.R. § 77.5 (1995) (general prohibition against *ex parte* contacts with represented parties). A party is an individual or organization that has been arrested or named as a defendant. *Justice Issues Final Rule on Lawyer Contacts with Parties* 63 U.S.L.W. 2094 (Aug. 16, 1994).

[225] 28 C.F.R. § 77.5 (1995).

[226] 59 Fed. Reg. 39,919 (1994) ("this distinction is grounded in logic and common sense"). *See also* United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) ("We do not believe that. . . [the relevant ethical rules were] intended to stymie undercover investigations when the subject retains counsel."), *cert. denied*, 464 U.S. 852 (1983).

[227] 28 C.F.R. § 77.7 (1995) (permitting contacts with represented persons on an *ex parte* basis).

communications are further restricted by two other new sections of the rule that prohibit contacts regarding plea negotiations and other legal agreements.[228] Section 77.8 prohibits government attorneys from initiating or engaging in negotiations of certain specified legal or plea agreements with any individual whom the attorney knows is represented by counsel, unless consent is given by the counsel.[229] The DOJ recognizes that this section poses a great risk to the attorney-client relationship, and also when a DOJ attorney accidentally oversteps legal bounds, may cause the greatest damage.[230] The DOJ recognized the delicate nature of this problem, and chose to restrict its attorneys from such contacts.[231]

Section 77.6 delineates the exceptions and circumstances under which DOJ attorneys may communicate directly or indirectly with a represented *party*, as opposed to a represented *person*.[232] The DOJ first allows contact for the purposes of determining whether or not representation exists.[233] This exception exists because there may be situations where it simply is not feasible to determine if there is, in fact, counsel for a person or target of an investigation.[234] The Department also noted that "any attempt to use [section 77.6(a)] to gather additional information about the subject matter of the representation would be a clear violation of these rules and would constitute sanctionable conduct."[235]

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[228] 28 C.F.R. §§ 77.8-77.9 (1995).

[229] 28 C.F.R. § 77.8 (1995) (plea negotiations and other legal agreements may not be subject of discussions with represented persons or parties).

[230] 59 Fed. Reg. 39,923 (1994) (discussing motivations behind promulgation of this section).

[231] *Id.*

[232] 28 C.F.R. § 77.6(a)-(f) (1995) (explaining exceptions to prohibition on communications with represented parties).

[233] 28 C.F.R. § 77.6(a) (1995) (first exception to prohibition on *ex parte* contacts).

[234] *See generally* 59 Fed. Reg. 39,920 (1994) (discussing and explaining purposes behind determination of representation exception).

[235] *Id.* (responding to comment that this provision is "an invitation to a more substantive conversation with a represented party").

Other exceptions to the ban on contacting represented parties include the "fearful defendant"[236] exception.[237] Under this exception, a DOJ attorney may secure a waiver from the defendant outside the court, and prior to any potentially important discussion, bring evidence supporting the waiver as having been made knowingly, intelligently, and voluntarily to the court.[238] Going before a judge or magistrate to execute such a waiver is not necessarily required; but it is explicitly mentioned in the Reno Rule's commentary that exceptional circumstances should surround such a procedure if the waiver will not be before a member of the judiciary.[239] Paradoxically, however, the comment to this section of the new rule, also notes that "[i]n general . . . the usual practice is for the [prosecutor] to obtain from the represented party a waiver before bringing the matter before the court."[240] This is one of the few particularly confusing sections of the Reno Rule, as the text of the statute does **not** require that the prosecutor go to a judge or magistrate to prove that the waiver was made knowingly and voluntarily, counsel should note that the comment to the Reno Rule regarding waivers offers conflicting views.[241] However, the commentary to the rule is not law, but the rule is law, and is controlling.[242]

A prosecutor is also granted an exemption from the anti-contact rule with respect to represented parties where there is a threat to safety and/or life

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[236] 59 Fed. Reg. 39,921 (1994).

[237] 28 C.F.R. § 77.6(c) (1995) (detailing steps to be taken by United States prosecutor after represented party initiates contact).

[238] *Id.*

[239] 59 Fed. Reg. 39,921 (1994) ("[i]n exceptional circumstances, it may be impractical or unsafe to bring the [represented] defendant before a judge or magistrate. . . to secure the waiver").

[240] 59 Fed. Reg. 39,921 (1994).

[241] *Compare* 59 Fed Reg. 39,921 (1994) (discussing that "exceptional circumstances" should exist when obtaining a waiver outside of a judge or magistrate) with 59 Fed. Reg. 39,921 (1994) (noting that "[i]n general" the usual practice is to obtain a waiver before bringing the matter to the court).

[242] 59 Fed. Reg. 39,911 (1994) ("[t]his final rule. . . is intended to constitute 'law'").

of anyone,[243] which should be viewed as a prudent and proper exception for the DOJ to promulgate. The Supreme Court has recognized that occasionally the public interest outweighs constitutional protections.[244]

Section 77.9 of the proposed Reno Rule applies regardless of whether a government attorney contacts a represented person or party.[245] The section notes that if a DOJ attorney contacts a represented person or party, either under section 77.7 or one of the exceptions of section 77.6, respectively, certain safeguards promulgated by section 77.9 still must be followed.[246] These safeguards include the recognition that it is unethical for a DOJ attorney to disparage counsel for the represented party or otherwise seek to disrupt the defendant's attorney-client relationship.[247] Furthermore, a government attorney may not seek information about defense strategies.[248]

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[243] 28 C.F.R. § 77.6(f) (1995). Here, the prosecutor must meet three basic requirements to initiate contact:

> "(1) [the government attorney must have a good faith belief that the safety...of any person is threatened; (2) the purpose of the communication must be to obtain information to protect against the risk of injury or death; and (3) the attorney for the government must, in good faith, believe that the communication is reasonably necessary to protect against such risk." *Id.*

[244] *See, e.g.*, New York v. Quarles, 467 U.S. 649, 657 (1984) (need for answers to interrogation in situations posing threat to public outweighs need for Miranda Rule protecting Fifth Amendment rights). Here, the Department, following the reasoning of the Court, has addressed the issue apparently to the satisfaction of those interested parties as no comments were received regarding this section. *See* 59 Fed. Reg. 39,922 (1994). It is not unheard of for the Department of Justice to "step in" over other areas of settled law, if the public good is viewed (by a court) to be countervailing. *See* Paul Gormley, Comment (1993) *Compulsory Patent Licenses and Environmental Protection*, 7 TUL. ENVTL. L.J. 131 139-41, (discussing Clean Air Act Compulsory License Provision and power of Attorney General to request compulsory licenses).

[245] 28 C.F.R. § 77.9 (1995) (noting restrictions that must be reserved if any *ex parte* contacts are undertaken).

[246] 28 C.F.R. § 77.9 (1995).

[247] *Id.*

[248] 28 C.F.R. § 77.9(a)(2) (1995). If the attorney suspects illegal strategies may be employed, or a conflict of interest exists, a specific exemption is recognized by the statute. *Id.* In United States v. Iorizzo, 786 F.2d 52 (2d Cir. 1986), the court held that a government attorney may not allow legal proceedings to occur if the attorney is aware of a conflict of interest existing between a defendant and his lawyer. *Iorizzo*, 786 F.2d at 59.

The Reno Rule allows DOJ attorneys to make or direct overt or covert contacts with individuals and/or organizations represented by counsel until either entity is arrested or charged with a crime.[249] The Reno Rule allows such attorneys to continue to conduct legitimate criminal and civil investigations against any entity, whether or not such an entity is represented by counsel.[250] However, the Reno Rule does not permit federal prosecutors to negotiate plea agreements or settlements with represented individuals without the consent of their counsel.[251] Prosecutors may not contact represented parties after their arrest, indictment, or the filing of a complaint for the purposes of discussing said actions.[252] The Reno Rule addresses when an attorney may communicate with an employee, officer, or director of organizations or corporations, making controlling individuals off limits on an *ex parte* basis.[253] Since former employees cannot be a controlling individual by definition, government attorneys may contact such a person on an *ex parte* basis, barring the private retainer of counsel.[254]

Contacting former employees in the course of investigating a company is a difficult issue for the Justice Department, as shown by the varied approaches allowed by courts in civil contexts.[255] The Justice Department, however, is aware of the perils of former employee contacts from first hand knowledge; "[i]t is not uncommon for federal prosecutors to encounter attorneys who assert that they represent every individual in a large corporation . . . ."[256] Corporations may not always expect protection from

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[249] 59 Fed. Reg. 39,922-23 (1994).

[250] *Id.* at 39,923.

[251] 28 C.F.R. § 77.8 (1995) (prohibiting *ex parte* contacts regarding negotiations or plea agreements).

[252] *Id.*

[253] 28 C.F.R. § 77.10(a)-(d) (1995) (delineating the exceptions and prohibitions regarding organizational employee contacts).

[254] 28 C.F.R. §§ 77.10(b)-(c) (1995).

[255] *See supra* notes 111-137 and accompanying text (discussing control group test, binding admission test, balancing test, and blanket test).

[256] 59 Fed. Reg. 39,924 (1994) (discussing problems faced by federal prosecutors regarding organizational representation).

damaging information during a period of trial preparation.[257] Courts have held that the DOJ should not be "stymie[d]" by the Code of Professional Responsibility, at least insofar as undercover investigations are concerned.[258] This may be extended to include *ex parte* contacts of former organizational employees.[259]

As to former employees, the Justice Department is correct in both its manner and form by noting that no former employee could be a "controlling individual"[260] as defined under section 77.10(a).[261] By definition under the Reno Rule's test, such an individual must be a *current* employee.[262] Former employees do not control the business of an organization and could not be considered controlling individuals.[263] Furthermore, the Justice

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[257] *See* Action Air Freight v. Pilot Air Freight, 769 F. Supp. 899, 903 (E.D. Pa. 1991) (the anti-conduct rule is not always meant to prevent the exchange of damaging information). *See also* Hanntz v. Shiley, Inc., 766 F. Supp. 258, 267 (D.N.J. 1991) (same).

[258] United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied,* 464 U.S. 852 (1983) (noting as unmanageable the notion that DR 7-104(A)(1) could prevent investigators from directing informants to contact represented targets); *Accord* In re Criminal Investigation No. 13, 573 A.2d 51, 55 (Md. Ct. Spec. App. 1990). The court in the latter case noted that the notion that the Code of Professional Responsibility could stymie both normal and undercover investigations is against "common sense." *Id.* The court gives an example of a Wall Street inside trader, the prosecution of whom would be dependent "upon hundreds of confidential interviews of employees [insisting on anonymity]." *Id.* The court further asserts that regarding undercover investigations, it is "inconceivable" that any undercover agent could gain the trust of an organization if the Model Rules governed. *Id.* The court concludes by pointing out that the scandals of "Watergate, Teapot Dome and Credit Mobilier" might not have been uncovered if anti-contact rules applied to prosecutors. *Id.*

[259] *See generally* Bruce A. Green, *A Prosecutor's Communications with Represented Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283 (1984).

[260] 28 C.F.R. § 77.10(a) (1995).

[261] 28 C.F.R. § 77.10 (1995). For the four conditions that must be met for an individual to be deemed controlling, see *supra* notes 138-140 and accompanying text.

[262] 28 C.F.R. § 77.10(a) (1995) (a controlling individual is a "current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding. . . ").

[263] 59 Fed. Reg. 39,925 (1994). The commentary to the Reno Rule notes that this rationale is consistent in a majority of federal courts. *Id.* (Citing Hanntz v. Shiley, Inc., 766 F. Supp. 258, 267 n.8 (D.N.J. 1991)(former employees statements cannot constitute employee admissions); Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412, 417-18 (D. Utah 1991)

Department has acknowledged that some former employees may have retained private counsel, and has promulgated a separate section recognizing the sanctity of such an attorney-client relationship.[264]

C. *Evaluations of Objections to the Reno Rule*

The Reno Rule was promulgated on August 4, 1994.[265] However, it met with a great deal of controversy from members of the bar.[266] For instance, the President of the National Association of Criminal Defense attorneys criticized the rule, saying "it was outrageous for Dick Thornburgh to try to exempt government lawyers in 1989 from ethical rules that apply to all lawyers and its outrageous for the Reno Justice Department to do it in 1994."[267] "In 1990, the ABA's House of Delegates unanimously adopted a resolution opposing the exemption."[268]

Members of the bench also opposed the rule. The Conference of Chief Justices issued a resolution, coinciding with the rule's promulgation date, that tells state bars and supreme courts to continue to enforce their local rules, ignoring the federal rule.[269] One judge went so far as to say that "[w]hat the attorney general is doing is blatantly illegal."[270] Another judge summed up the various feelings of the state bench saying, "...if they can by a

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(rejecting argument that former organizational employees are subject to protections of Model Rule 4.2); Sherrod v. Furniture Center, 769 F. Supp. 1021 1022 (W.D. Tenn. 1991) ("former employees have no authority under law to bind [a] corporation"); Dubois v. Gradco Systems, Inc. 136 F.R.D. 341, 345 n.4 (D. Conn. 1991) (noting that bar associations are in uniformity on this question).

[264] 28 C.F.R. §§ 77.10(c)-(d) (1995).

[265] 28 C.F.R. § 77 (1995).

[266] Daniel Wise, *Clinton Administration Embraces Thornburgh Memo*, N.Y.L.J., Aug. 8, 1994 (reporting on wave of protests from various entities and discussing rule's provisions and history).

[267] Wise, *supra* note 266 at 1.

[268] Mark Curriden, *Feds, State Judges in Showdown*, NAT. L.J., Aug. 15, 1994 at A11 (noting that experts predict this issue will eventually be settled by the United States Supreme Court).

[269] *Id.*

[270] *Id.*

simple federal mandate sweep aside this ethics rule, what else...will they do?"[271]

The above comments are indicative of the general tone of remarks received during the rule's comment period.[272] During the last and final comment period,[273] the DOJ received comments from thirty-one sources.[274] Of the comments received, twenty comments opposed the rule, nine supported promulgation, and two others stated no clear position on the rule as a whole.[275]

There were three general issues of concern by those commenting on the rule.[276] These were (1) those addressing need for the rule, (2) the constitutional and statutory authority for such a rule, (3) and the sufficiency of the rule's internal enforcement mechanisms.[277] Each concern is discussed and evaluated below.

1. ***The Need for the Reno Rule***

Those objecting to the rule on this basis tended to criticize it as attempting to hold government attorneys to lower ethical standards than other attorneys.[278] However, the Justice Department reiterated that the rule is not meant to diminish the ethical requirements of United States attorneys, but is

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[271] *Id.*

[272] *See generally* 59 Fed. Reg. 39,912-13 (1994) (reviewing comments received regarding proposed rule).

[273] The last day the Department of Justice accepted comments to the then-proposed rule was April 4, 1994. 59 Fed. Reg. 39,912 (1994).

[274] *Id.* at 39,913

[275] *Id.* "Nine individuals, nine organizations, four state court judges, one federal court judge, five U.S. Attorney's Offices, two Department of Justice components, and one other federal agency" made up the tally of commentaries. *Id.*

[276] *Id.*

[277] *Id.* The comments received tended to mirror comments received regarding earlier proposed rules of the same nature.

[278] *Id.*

instead intended to clarify those requirements.[279] Indeed, citing uncertainty, confusion, chilling effects, and lower effectiveness of law enforcement,[280] the Justice Department maintained that the purpose of the regulation is to "provide a uniform rule of ethics regarding contacts with represented persons that can be consistently and predictably applied."[281] Further, the Justice Department plans to limit the United States Attorneys' abilities to engage in noncustodial communications with represented targets of investigations through provisions in the United States Attorneys' Manual.[282] While the DOJ recognizes that there is no mandatory need for this, there is still the important need to hold government attorneys to the same, if not higher, ethical standards than required of private practitioners.[283] Admittedly, mere publishing of certain restrictions in the U.S. Attorney Manual may amount to a perfunctory version of constructive notice. This is only determinable after time and evaluation of the Reno Rule has been in effect for a reasonable period of time. Until it is shown otherwise, the Justice Department has demonstrated the troubling situations prosecutors face, and its attempt to rectify the situation appears to be an attempt to untie the hands of its prosecutors.[284]

2. *The Authority for the Reno Rule*

Some argue that the Attorney General does not have the authority, delegated or explicit, to promulgate the regulation.[285] Some commentators argued that Congress never gave any authorization to the Justice Department

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[279] *Id.*

[280] *Id.* at 39,910-12. (factors necessitating promulgation of the Reno Rule include uncertainty, confusion, and chilling effects on federal prosecutors, as well as lower overall effectiveness of law enforcement).

[281] *Id.* at 39,915. (answering criticisms regarding the need for the rule).

[282] *Id.* at 39,915. However, if an investigation focuses on a single individual, the suspect's right to counsel would still not be triggered. Hoffa v. United States, 385 U.S. 293 (1966).

[283] 59 Fed. Reg. 39,915 (1994).

[284] *Id.* at 39,911.

[285] *Id.* at 39,915.

to promulgate regulations that would override state ethics rules.[286] However, the Supreme Court has held that the delegation power of Congress need not be specific.[287] Also, according to 5 U.S.C. § 301, the Attorney General is authorized to "prescribe regulations for the government of [the Department.]"[288] Indeed, the Supreme Court itself has held that the Attorney General may issue regulations with far-reaching implications.[289] Furthermore, the DOJ correctly argues that in addition to 5 U.S.C. § 301, the Justice Department is charged by Title 28 of the United States Code to regulate Justice Department attorneys,[290] and is, therefore, well within its bounds in promulgating this rule.[291] Moreover, the Supreme Court has held that Congress may expressly preempt all state regulation in an area of law.[292] The Supreme Court has "held repeatedly that state laws can be pre-empted by federal regulations as well as state statutes."[293] Lower federal courts have reached the same conclusion, no doubt for fear of balkanizing federal law.[294]

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[286] *Id.* (discussing criticisms based on the Department of Justice's authority for the Reno Rule).

[287] Chrysler Corp. v. Brown, 441 U.S. 281, 307-08 (1979) (ruling, in a Freedom of Information Act case, that there is no private right to enjoin an agency from disclosure under the Act).

[288] 5 U.S.C. § 301 (1994).

[289] *See* Georgia v. United States, 411 U.S. 526, 536 (1973) (section 301 gives the Attorney General clear authority to issue regulations establishing standards that are binding on state and local governments).

[290] *See, e.g.*, 28 U.S.C. §§ 509-547 (1994).

[291] 59 Fed. Reg. 39,915 (1994).

[292] City of New York v. FCC, 486 U.S. 57, 64 (1988). *See also* Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 247-55 (1947) (Congress may preempt state law in a particular field of law). Similarly, in Breda v. Scott, 1 F.3d 908 (9th Cir. 1993), a lawyer representing a union member was sued for malpractice in his handling of an employee discharge. The Court of Appeals for the Ninth Circuit held that the entire field was governed by federal law, and that federal law required that unions and their agents be given free reign.

[293] Hillsborough County, Fla. v. Automated Med. Labs, 471 U.S. 707, 713 (1985).

[294] Grievance Committee for the Southern District of New York v. Simels, 48 F.3d 640, 645-46 (2d Cir. 1995) ("requiring a federal court to follow the various and often conflicting state court and bar association interpretations of a disciplinary rule . . . threatens to balkanize federal law"). The court held that the interpretation of DR 7-104(A)(1), in the federal criminal context was a

Consequently the statutes cited by the Justice Department do give it authority to promulgate such a regulation.[295] Furthermore, as the Department has recognized, the regulation has taken the line of analysis adopted by the clear majority of courts interpreting local district court rules governing contacts with represented persons.[296]

3. *Sufficiency of Self Regulating, Enforcement Mechanisms*

Still other commentators contend that the rule, as proposed, lacks an appropriate deterrence enforcement mechanism for attorneys who are tempted to violate contact rules.[297] The general view is that the Justice Department cannot be trusted to do so.[298] However, the DOJ placed assurances on the record that it fully intends to enforce the new rules and to heavily sanction its violators.[299]

There is no concrete reason to doubt the Justice Department regarding its assurances. To do otherwise without basis in fact, as critics have done represents circular logic and is otherwise untenable in light of the DOJ's plans to add the Reno Rule's policies and goals to the United States Attorneys' Manual.[300] However, the mere fact that an attorney is employed by the Justice Department does not automatically guarantee that the attorney will act ethically. Although the Justice Department expects that all of its attorneys will follow each and every provision of its manual regarding *ex parte* contacts,[301] there is no way to guarantee this. However, any attorney

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matter of federal law. ID. at 646.

[295] *Id.*

[296] 59 Fed. Reg. 39,917 (1994) (discussing United States v. Ryans, 903 F.2d 731, 739 (10th Cir), *cert. denied,* 498 U.S. 855 (1990). Ryans provides an excellent survey of case law regarding this area.

[297] 59 Fed. Reg. 39,917-18 (1994).

[298] Id. at 39,918. (discussing criticisms that the Department of Justice could not be trusted to provide sufficient self policing policies).

[299] *Id.*

[300] *Id.*

[301] *Id.*

failing to do so would meet with disciplinary action by the Justice Department.[302] Similarly, there is no guarantee that every private practitioner will conduct himself in an ethical manner.

V. CONCLUSION

Ethically, judge advocates have, at least in recent times, served two masters--their military service's code of ethical conduct and that of the high court of their respective states. However, the ethical rules have rarely, if ever, conflicted. Federal prosecutors have only recently begun to face such dilemmas. The amending of Model Rule 4.2, especially if the change is adopted by state high courts,[303] signals more worries for those charged with enforcing the law, whether military or civilian. However, only federal prosecutors currently have a shield at this time.

The Reno Rule is a much needed addition to the current body of ethical law in the United States. The rule allows prosecutors to fulfill their role in society as law enforcement officials, while still preserving the spirit of protection for parties to lawsuits. While there has been significant criticism of these provisions, the scenarios mentioned in the introduction, as well as the possibilities of evidence suppression mentioned in the *Hammad* case, *supra*, give rise to the need to protect federal prosecutors from possible ethics sanctions as they conduct their investigations and perform the duties required by their offices.

The Justice Department has recognized the paradox of multiple attorneys on a case being subjected to multiple rules of state ethics.[304] The rule put forth by the Department represents a valid and needed easing of the minds of federal prosecutors. Some members of organizations, of course, are entitled to the shield of that organization's counsel. However, this should not extend to lower level employees. The Reno Rule has specifically recognized this issue, and its test for "controlling individual[s]"[305] represents a reasoned consideration of interests relevant to organizational

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[302] *Id.*

[303] This can be pessimistically viewed as likely to happen considering the reaction to the Reno Rule from state high court justices. *See supra* notes 269-71 and accompanying text.

[304] 59 Fed. Reg. 39,910 (1994).

[305] 28 C.F.R. § 77.10(a) (1995).

contacts. As long as appropriate and vigorous self-regulation is in place, as exists with the Reno Rule, this type of rulemaking serves only to further the society that the Justice Department protects.

WHITHER GOLDWATER-NICHOLS?

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I. INTRODUCTION

This article examines defense reform in the last part of the twentieth century. Particularly, it discusses the Goldwater-Nichols Department of Defense Reorganization Act of 1986[1] (Goldwater-Nichols) and its significant impact on the entire Department of Defense. An examination of defense reform initiatives is especially timely today considering that 1996 marks the tenth anniversary of Goldwater-Nichols. The roles and duties of the Joint Chiefs of Staff and Chairman of the Joint Chiefs of Staff, the Joint Staff, the Service Secretaries and Chiefs and the Commanders of the Unified and Specified Commands have all been affected and will be discussed in this article. The article also outlines the evolving roles and missions of the four services and the debate surrounding these changes. This includes past and future attempts to revise the roles and missions of the Armed Forces. The present period of decreased military spending and budgetary constraints in an increasingly volatile global community also renders this article particularly timely.

II. HISTORICAL BACKGROUND

Prior to World War II, the United States military establishment was organized within the Department of War and the Department of the Navy.[2]

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[1] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.).

[2] THOMAS D. BOETTCHER, FIRST CALL: THE MAKING OF THE MODERN U.S. MILITARY, 1945-1953, at 6-8 (1992).

Since its inception in early American history, this formulation served our country for well over a century. Nevertheless, World War II demonstrated the necessity for more interaction between the services. It became obvious that military success required a single direction of military components. As a result, sentiments for a reorganization of the military to achieve this end materialized. For many, it was apparent that the nature of modern warfare required combined operations by land, sea and air.[3] Further, the most effective force mixture required a unified and coordinated process for structuring forces. After World War II, as President Eisenhower would later express, "separate ground, sea and air warfare [was] gone forever."[4]

Strong and divergent views about reorganizing the military establishments emerged post World War II. The Army, within the War Department, and the Navy and Marine Corps, within the Department of the Navy, developed entirely different management structures. The Army's organizational concept was a vertical command structure, while the Navy and the Marine Corps developed a linear, more decentralized structure.[5] Developing a single military organization encompassing all of the services would therefore require substantial changes and compromises by the Department of War and the Department of the Navy. To further complicate matters, the Army Air Force, after a successful war effort, garnered support for co-equal status for the air forces with land and sea forces.[6]

While considering how to reorganize the military establishment, the United States was also formulating its post-war military strategy. The doctrine of "containment," originally formulated by George Kennan, was conceived to check Soviet expansionism and would become the principal U.S. strategy for roughly forty years, until the end of the cold war.[7] This strategy would be important as new roles and functions of the military establishment were developed. The debate over the military's post-war strategy and reorganization intensified.

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[3] BLUE RIBBON DEFENSE PANEL, REPORT TO THE PRESIDENT AND THE SECRETARY OF DEFENSE ON THE DEPARTMENT OF DEFENSE 12 (1970).

[4] Special Message to the congress on Reorganization of the Defense Establishment, 1958 PUB. PAPERS doc. 65 (April 3, 1958).

[5] BOETTCHER, *supra* note 2, at 7.

[6] *Id.*

[7] *Id.* at 103.

III. EARLY LEGISLATION AND OTHER INITIATIVES

The National Security Act of 1947 was the first in a series of legislative attempts to achieve more unity and integration among the military departments.[8] The Act designated the War Department as the Department of the Army and established the Department of the Air Force as a co-equal to the Department of the Army and Department of the Navy.[9] The Act also created the National Military Establishment, consisting of the Departments of the Army, Navy and Air Force (with the Army, Navy and Marine Corps, and Air Force within their respective Departments). Finally, the Act established the position of Secretary of Defense as "principal assistant to the President in all matters relating to the national security."[10]

This legislation responded to the need for integration among the services while recognizing the service branches' continued interest in the three Executive Departments - Army, Navy and Air Force - retaining cabinet-level authority. The Secretaries of the three Military Departments also retained all of their powers and duties, subject only to the authority of the Secretary of Defense to establish "general" policies and exercise "general" direction, authority and control.[11]

After the enactment of the National Security Act of 1947, a corollary attempt to delineate and clearly establish the roles of the four branches was reflected in a document entitled *Functions of the Armed Services and the Joint Chiefs of Staff* (commonly referred to as the Key West Agreement). Section I of the Key West Agreement states five goals to be achieved in a resolution agreed to by Secretary of Defense James Forrestal and the four Service Chiefs. The goals were:

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[8] National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended at 50 U.S.C. § 401 (1994)).

[9] *Id.* §§ 205(a), 207(a).

[10] *Id.* § 202(a).

[11] BLUE RIBBON DEFENSE PANEL, *supra* note 3, at 14.

(1) Effective strategic direction of the armed forces;

(2) Operation of armed forces under unified command, wherever such unified command is in the best interest of national security;

(3) Integration of the armed forces into an efficient team of land, naval, and air forces;

(4) Prevention of unnecessary duplication or over-lapping among the services, by utilization of the personnel, intelligence, facilities, equipment, supplies and services of any or all services in all cases where military effectiveness and economy of resources will thereby be increased;

(5) Coordination of armed forces operations to promote efficiency and economy and to prevent gaps in responsibility.[12]

In theory the Key West Agreement was designed to increase unification and integration of the four services. However, in practice the Agreement had little harmonizing effect and otherwise enabled all four services to retain those functions most important to them.

Only two years after the first legislative attempt at integration, Congress passed the National Security Act Amendments of 1949.[13] These amendments were spurred by the Eberstadt Task Force Report to the Hoover Commission on the Organization of the Executive Branch of Government and calls by Secretary of Defense James Forrestal for stronger unification efforts. The National Military Establishment was replaced by the Department of Defense (DOD), headed by the Secretary of Defense, a cabinet-level position. The military departments lost their cabinet-level authority and each department became part of the Department of Defense.[14] Further, the position of Chairman of the Joint Chiefs of Staff (CJCS) was statutorily created, although originally he was given

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[12] *Functions of the Armed Forces and the Joint Chiefs of Staff* 2 (Mar. 11-14, 1948)(Copy on file with author.) [hereinafter *Key West Agreement*].

[13] National Security Act Amendments of 1949, Pub L. No. 81-216, 63 Stat. 578 (1949) (codified as amended in various sections of 5 & 10 U.S.C.).

[14] *Id.* § 4.

authority only to preside as a non-voting member of the Joint Chiefs of Staff (JCS).[15]

Again in 1958, Congress passed reform legislation with the Department of Defense Reorganization Act of 1958, authorizing greater centralized control and authority within DOD.[16] The "general" authority originally provided to the Secretary of Defense in 1947 was redefined as "direction, authority and control" of the Department of Defense. The Secretary was given broader discretion to reorganize the department, specifically in logistical areas.[17] The chain of command was also clarified and shortened by the Military Departments. To facilitate this change the concept of unified and specified combatant commands was established by law, combining forces from the Army, Navy, Air Force, and Marine Corps as the Secretary of Defense saw fit.[18]

IV. DEPARTMENT OF DEFENSE REORGANIZATION ACT OF 1986

Between 1958 and 1986, no major statutory reform occurred significantly affecting the Department of Defense or the armed forces. However, despite the absence of legislative change, several studies and many prominent individuals criticized the defense system and called for reform measures. The studies included the Blue Ribbon Defense Panel, conducted in 1970[19], and the President's Blue Ribbon Commission on Defense Management, commissioned in 1985 and completed in early 1986[20]. Two of the nation's most respected senior military officers also became outspoken proponents of

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[15] *Id.* § 7(b).

[16] Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, 72 Stat. 514 (1958) (codified as amended at 50 U.S.C. § 401 (1994)).

[17] *Id.* § 3.

[18] *Id.* § 5(b).

[19] BLUE RIBBON DEFENSE PANEL, *supra* note 3.

[20] President's Blue Ribbon Commission on Defense Management, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT (1986).

reform: General Edward C. Meyer, former Army Chief of Staff[21] and General David C. Jones, former Chairman of the Joint Chiefs of Staff[22].

Also in 1985, the Staff Report to the U.S. Senate Committee on Armed Services entitled *Defense Organization: The Need for Change*, outlined a list of sixteen broad problem areas and the committee's recommendations for reform. Among the areas of concern were: (1) limited mission integration at the Department of Defense policy making level, (2) an imbalance between service and joint interests, (3) inter-service "logrolling," (4) inadequate joint advice, and (5) a lack of clarity of strategic goals.[23]

Finally in 1986, after much debate and almost forty years after its first attempt at modern defense reform, the Congress passed the most significant defense reform initiative since the National Security Act of 1947.[24] On October 1, 1986, President Reagan signed into law the Goldwater-Nichols Department of Defense Reorganization Act of 1986 (commonly referred to as the Goldwater-Nichols Act).[25]

In enacting the Goldwater-Nichols Act, Congress' intention was to formulate a policy:

(1) to reorganize the Department of Defense and strengthen civilian authority in the Department;

(2) to improve the military advice provided to the President, the National Security Council, and the Secretary of Defense;

(3) to place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands;

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[21] LOUIS J. MOSES, THE CALL FOR JCS REFORM: CRUCIAL ISSUES 1 (1985).

[22] *Id.*

[23] Staff of Senate Comm. on Armed Service, 99th Cong, 1st Sess, DEFENSE ORGANIZATION: THE NEED FOR CHANGE 3-11 (Comm. Print 1985).

[24] See *supra* note 8 and accompanying text.

[25] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended at 10 U.S.C. § 164 (1994)).

(4) to ensure that the authority of the commanders of the unified and specified combatant commands is fully commensurate with the responsibility of those commanders for the accomplishment of missions assigned to their commands;

(5) to increase attention to the formulation of strategy and to contingency planning;

(6) to provide for more efficient use of defense resources;

(7) to improve joint officer management policies; and

(8) otherwise to enhance the effectiveness of military operations and improve the management and administration of the Department of Defense[26].

As part of the 99th Congress' historic attempt at defense reorganization, Goldwater-Nichols accomplished several goals. Among them was the strengthening of the position of the Chairman of the Joint Chiefs of Staff, enhancing the role of the Joint Staff, and shifting authority from the Service Chiefs to the Commanders of the Combatant Commands.

A. *Role/Duties of the CJCS and the JCS*

The position of CJCS was created by the 1949 Amendments to the National Security Act.[27] However, as mentioned, the CJCS was initially a non-voting member who presided over the JCS without command authority. Although eventually given voting privileges, the CJCS did not solely control military advice going to the President. Instead, decisions were made by committee, with the Service Chiefs still very influential and heavily involved in the process[28].

In the period leading up to Goldwater-Nichols there were several reasons expressed for retaining the "decision by committee" approach, rather than strengthening the Chairman's position. These included: (1) the risk of a single entity usurping civilian control, (2) the importance of providing a wide

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[26] *Id.* at § 3.

[27] National Security Act Amendments of 1949, Pub. L. No. 81-216, 63 Stat. 578 (1949).

[28] MOSES, *supra* note 21, at 7-9.

variety of views to the Secretary of Defense and President, and (3) the need to maintain the direct linkage between the role of the Service Chief and the JCS principal functions, which served to enhance capabilities.[29]

As mentioned previously, one adamant proponent of JCS reform in the period leading up to the passage of Goldwater-Nichols was Army General Edward C. Meyer, who was also a former member of the JCS. General Meyer believed the structure existing prior to Goldwater-Nichols "fail[ed] to provide the quality of professional military advice necessary to ensure that elected and appointed civilian leadership have an adequate understanding of military impact of their decisions."[30]

To remedy these perceived shortcomings, the Goldwater-Nichols Act made the CJCS the "principal military advisor to the President, the National Security Council, and the Secretary of Defense."[31] Further, the Act broadened the Chairman's control over the JCS agenda. The Act provides that the Chairman shall "provide [an] agenda for the meetings of the Joint Chiefs of Staff" (including, *as the Chairman considers appropriate*, any subject for the agenda recommended by any other member of the Joint Chiefs of Staff).[32] A second provision with similar language also broadens the Chairman's authority. In carrying out his functions, duties, and responsibilities, the Chairman shall consult with and seek the advice of the Service Chiefs and Commanders-in-Chief of the Unified and Specified command (CINC's) only "*as he considers appropriate.*"[33]

These two provisions are significant. Prior to Goldwater-Nichols, the Chairman lacked substantial authority to steer the JCS toward true "joint" concerns. Previously the Service Chiefs frequently used their roles as advisors and their ability to set JCS agendas to promote their own services.[34] In providing more authority to the Chairman and allowing him to emphasize

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[29] *Id.* at 6.

[30] ALLAN R. MILLETT ET AL., THE REORGANIZATION OF THE JOINT CHIEFS OF STAFF: A CRITICAL ANALYSIS 55 (1986).

[31] 10 U.S.C. § 151(b) (1994).

[32] *Id.* § 151(g)(2)(B) (emphasis added).

[33] *Id.* § 151(c)(1) (emphasis added).

[34] MOSES, *supra* note 21, at 6-8.

integration among the Armed Forces, the Act removed the Service Chiefs from the direct control of military operations and forced them to concentrate on organizing, training, and equipping their individual services.[35]

B. ***Role/Duties of the Joint Staff***

One of the major criticisms of the Joint Staff prior to the Goldwater-Nichols reform was that it worked for the Joint Chiefs of Staff, as a whole, with each Service Chief exerting a similar amount of influence on and control over the Joint Staff.[36] Thus, the decisions reached by the Joint Staff were often filled with compromises and lacked any true direction or force.[37] This view was expressed by the President's Blue Ribbon Commission on Defense Management. Accordingly, the Commission recommended that the "[c]urrent law be changed to place the Joint Staff and the organization of the Joint Chiefs of Staff under the exclusive direction of the Chairman, to perform such duties as he prescribes to support the JCS and to respond to the Secretary of Defense."[38]

Another problem was that the services did not always send their best officers to serve on the Joint Staff. The quality of the servicemembers generally was not on par with the rest of the service population, especially in the areas of promotion and school selection.[39] Servicemembers viewed assignment to the Joint Staff as a step backward in their professional careers and many attempted to get out of the assignment as quickly as possible[40]. This lack of continuity and the poor quality of the officers often led to inferior work produced by the Joint Staff[41].

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[35] Thomas T. LoPresti, THE JCS SYSTEM BEFORE AND AFTER GOLDWATER-NICHOLS, 31 (May 1991) (on file with the Defense Technical Information Center, Alexandria, VA).

[36] *Id.* at 22.

[37] *Id.*

[38] PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, *supra* note 20, at 37.

[39] LoPresti, *supra*, note 35, at 22.

[40] *Id.* at 23.

[41] *Id.* at 23-24.

Goldwater-Nichols mandates that the Joint Staff function as the chairman's staff, responding to the direction and guidance of the CJCS. The major vehicle for reform of the Joint Staff is the codification of joint duty positions and the establishment of Joint Specialty Officers (JSO) for all the services.[42] Prior to assignment to a joint duty position, officers from all branches of the Armed Forces must now attend formal joint schooling. Further, promotion to flag officer now requires some type of joint duty, and officers selected for promotion to those ranks are required to have a requisite level of joint knowledge and the proper joint perspective.[43] Finally promotion rates for joint duty officers are required by Goldwater-Nichols to be the same as those for officers serving on their own service's staff.[44]

C. ***Role of the Service Chiefs and Commanders of Combatant Commands***

During the defense reform debate, the principal argument for change concerning the Service Chiefs was that the dual role of Service Chief and JCS member was overly demanding.[45] This view was expressed by Mr. James Woolsey, former Under Secretary of the Navy, during House Armed Services Committee hearings on JCS reform in 1982.[46] Woolsey explained that the dual roles placed more demands on an individual than he could reasonably meet considering the importance of the position.[47] Further, the range of subjects a JCS member must be versed in requires in-depth knowledge and control over an enormous amount of information.

Also during the mid-80s, General Edward C. Meyer underscored the problem further by stating that under the pre-Goldwater-Nichols formulation, "[t]here [was] inadequate time for the Chief of a Service to lead his Service and

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[42] 10 U.S.C. § 661(a) (1994).

[43] *Id.* § 663(a).

[44] *Id.* § 662(a)(1)-(3).

[45] MOSES, *supra* note 21, at 6.

[46] *Hearings on the 'Reorganization Proposals for the Joint Chiefs of Staff' Before the House Armed Services Comm.*, 97th Cong., 1st Sess. 568 (1982) (Statement of Jim Woolsey, former Under Secretary of the Navy).

[47] *Id.*

to direct joint activities without slighting one or both responsibilities."[48] Meyer cited specific examples of the time constraints placed on the Service Chiefs by their roles in arms negotiations, strategy decisions, and operational efforts. Specifically, he referenced the Long Commission, which questioned the chain of command and political-military role of Marines in Lebanon, and the Holloway Commission's criticism of the rescue mission into Iran in 1980.[49] Meyer also argued that both demands of time and his duties "preclude the Chief of a Service from being as unfettered as he must be in providing military advice on critical strategic and operational matters." He contended that the role of the Service Chiefs must change "to ensure that the *system* permits these highly qualified officers to focus their attention on the critical issues which face our nation and our forces."[50]

Goldwater-Nichols attempted to alleviate a part of this problem by broadening the authority of the CJCS and increasing the input of the Commanders of the Combatant Commands (CINC's). Of key concern for the CINC's was their historic responsibility in executing plans supporting policies in which they had little or no input.[51] Goldwater-Nichols clearly defined the chain of command as running from the President to the Secretary of Defense to the CINC's. Further, Goldwater-Nichols includes the CINC's in the selection and evaluation of component commanders, and requires that the CINC's be kept appraised of all component activities.[52]

V. THE PRACTICAL EFFECTS OF GOLDWATER-NICHOLS

Whether Goldwater-Nichols has worked in the "real world" over the past decade is a legitimate question. The end of the Cold War and the elimination of communism as a threat to our nation has forced the Department of Defense to redefine its objectives. Today, the U.S. military is involved in a number of diverse missions across the globe using unique, often divergent, methods, equipment and personnel.

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[48] Millett, *supra* note 30, at 55.

[49] *Id.* at 58.

[50] *Id.*

[51] LoPresti, *supra* note 35, at 24.

[52] 10 U.S.C. §§ 162-64 (1988).

In light of Goldwater-Nichols' goal of integration among the services, this section of the article will highlight the impact of Goldwater-Nichols on a few recent events. Specifically, the increased authority of the Secretary of Defense, the CJCS, and the CINC's will be analyzed in an operational context (i.e., Operation Desert Storm) and in an organizational context (i.e., the Defense Finance and Accounting Service (DFAS)).

A. *Operation Desert Storm*

The first major military test for the Goldwater-Nichols Act was Operation Desert Storm. The unambiguous victory in the Gulf War assured the proponents of military reform that Goldwater-Nichols had accomplished its goals of increased integration, more focused authority and clearer lines of command. The unification efforts of the Act resulted in "[t]he unique contributions of the individual services . . . combined in an effective and innovative way to create the most capable military force in the modern era."[53]

The most demonstrable example of the military reform Goldwater-Nichols achieved was the changing role of the Chairman of the Joint Chiefs of Staff, General Colin Powell. As a direct result of Goldwater-Nichols, Chairman Powell wielded more control, power, and influence than any CJCS before him, and his authority came at the expense of the other JCS members.[54] Another individual who directly benefitted from the policy of Goldwater-Nichols was General Norman Schwarzkopf, Commander-in-Chief of the United States Central Command. In testimony before the Congress, at the end of Operation Desert Storm, General Schwarzkopf commented,

Goldwater-Nichols established very, very clear lines of command authority and responsibilities over subordinate commanders, and that meant a much more effective fighting force in the Gulf. The lines of authority were clear, the lines of responsibility were clear, and we just did not have any problem in that area -- none whatsoever[55].

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[53] 138 CONG. REC. S9559-64 (daily ed. July 2, 1992) (Statement of Sen. Nunn).

[54] Bernard E. Trainor, *Jointness, Service Culture, and the Gulf War*, JOINT FORCES, Winter 1993-94, at 72.

[55] 138 Cong. Rec. S9559-64, *supra* note 53 (Statement of Sen. Nunn quoting Gen. Norman Schwarzkopf).

An example of General Schwarzkopf's control over Desert Storm was that even Service Chiefs could not visit the theater without the express permission of Schwarzkopf and even then only to communicate with personnel from their own service.[56] Otherwise, the Service Chiefs had a limited role in the Gulf War. Goldwater-Nichols had drawn clean, crisp lines of communication and authority, in which "[s]ervice component commanders under Schwarzkopf communicated only with him and he only communicated with Powell."[57]

B. *Defense Finance and Accounting Service (DFAS)*

An example of consolidation within the Department of Defense that demonstrates the Secretary's increased organizational authority under Goldwater-Nichols is the Defense Finance and Accounting Service ("DFAS"). Through DFAS, the Secretary of Defense established a Department of Defense-wide accounting and finance organization under authority granted to him by Goldwater-Nichols. This consolidation effort resulted from demands for more efficiency and the elimination of duplicative activities previously performed by each of the military departments. In the Department of Defense Comptroller's *Report on the Consideration and Improvement of Financial Operations within the Department of Defense*, the Comptroller recommended:

> (1) the establishment of a single DoD-wide accounting and finance organization;
>
> (2) The consolidation of DoD accounting and finance operations; and
>
> (3) The improvement of DoD accounting and finance operations.[58]

To create the DoD-wide DFAS program, the Secretary of Defense was required to remove these duties from the individual military departments. With regard to the Secretary of Defense in this capacity, Title 10 of the United States Code provides:

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[56] *Id.*

[57] *Id.*

[58] Memorandum from the Office of General Counsel of the Department of Defense to the Department of Defense Comptroller 1-2 (May 21, 1990) (on file with authors).

> Subject to section 2 of the National Security Act of 1947 (50 U.S.C. 401), the Secretary of Defense shall take appropriate action (including the transfer, reassignment, consolidation, or abolition of any function, power, or duty) to provide more effective, efficient, and economical administration and operation, and to eliminate duplication in the Department of Defense.[59]

Thus, section 125(a) authorizes the Secretary of Defense to take appropriate actions for carrying out the economical operation and administration of Department of Defense functions unless the function, duty or power is vested in another agency or department officer or official.

The military departments which formerly handled accounting and finance activities did so under the authority granted in separate, but otherwise identical, provisions of Title 10 of the United States Code.[60] However, language in each of these sections subordinates the military departments to the Secretary of Defense. For instance, 10 U.S.C. § 3013(c)(5) provides, in pertinent part, that the Secretary of the Army is "[s]ubject to the authority, direction, and control of the Secretary of Defense," as well as responsible for the "effective cooperation and coordination between the Department of the Army and the other military departments and agencies of the Department of Defense to provide for more effective, efficient, and economical administration and to eliminate duplication."[61]

When proposing to consolidate the accounting and finance services under DFAS, the Secretary used the provisions discussed above to facilitate his authority to create an integrated system. The language of section 125(a) charges the Secretary with promoting efficiency and consolidation within the Department of Defense. The accounting and finance functions were not specifically delegated to the military departments. In addition, sections 3013(c)(5), 5013(c)(5), and 8013(c)(5) subject the Service Secretaries to the Secretary of Defense's authority and control and requires them to eliminate duplication among the services. As a result, the Defense Finance and Accounting System

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[59] 10 U.S.C. § 125(a) (1994). Although this section existed prior to the enactment of Goldwater-Nichols, the Act did modify the language relating to the authority of the Secretary of Defense.

[60] See 10 U.S.C. §§ 3013, 5013, 8013(b) (1994), respectively, for the provisions relating to the Departments of the Army, Navy, and Air Force.

[61] See 10 U.S.C. §§ 3013, 5013(c)(5), 8013(c)(5) (1994), respectively, for the provisions relating to the Secretaries of the Navy and Air Force.

was established to provide greater efficiency and reduce redundancy within the Department of Defense[62].

The enactment of Goldwater-Nichols dramatically changed the organization of the Department of Defense. It represents the most sweeping piece of defense legislation in almost forty years, and many consider the Act an effective first step to solving the Department's problems.

Having discussed the Goldwater-Nichols Act and its practical effect on the DOD, this article now discusses roles and missions reform. Although touched on by Goldwater-Nichols, the DOD has not adequately addressed the subject; it has become more elusive than any other aspect of defense reform.

VI. THE ROLES AND MISSIONS DEBATE

For much of the twentieth century the roles, missions and functions of the Armed Forces have revolved around and focused on one thing: the threat of Communism and the Soviet Union. However, the past decade has seen the end of the Cold War and demise of the Soviet Union. This historic event sparked a debate about the future of the National Security Strategy of the United States. The debate over the "roles and missions" of the Armed Forces and the part each service will play in our country's national defense is again at the center of the defense reform debate. In a July 1992 floor speech, Senator Sam Nunn, then Chairman of the Senate Armed Services Committee, labeled roles and missions "[o]ne of the biggest problems we now face" especially in an era of military downsizing and less government spending on national defense in general.[63]

To better understand the debate over defense reorganization some terminology must be defined. Accordingly, "roles" are defined as the broad and enduring purposes for which the Services were established by Congress in law. "Missions" are the tasks assigned by the President or the Secretary of Defense to the commanders of the combatant commands (CINC's). Finally, "functions" are specific responsibilities assigned by the President and Secretary of Defense to enable the Services to fulfill their legally established roles. From a historical perspective, the importance of defining (and deciding each Service's) roles, missions and functions became important as early as the mid-1940s when the

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[62] Memorandum, *supra* note 58, at 1-2.

[63] 138 CONG. REC. S9559, *supra* note 53.

first serious attempts were made at integrating the numerous components of the U.S. military. The now-famous Key West Agreement[64] initially sought to define each of the four services' various roles and missions as early as 1948. Only later was it realized, however, that Key West failed because it largely avoided sensitive issues and allowed some overlap and duplication among the services[65].

Today, Title 10 of the United States Code explicitly defines the roles of the four services. Accordingly, section 3062(b) of Title 10 states that the Army "shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land" and is "responsible for the preparation of land forces necessary for the effective prosecution of war."[66]

Similarly, Title 10 defines the roles of the Navy and Air Force exactly as above except to replace references to "operations on land" and "land forces" with "operations at sea" and "naval forces" when referring to the Navy; and "offensive and defensive air operations" and "air forces" when referring to the Air Force.[67] The roles of the Marine Corps are also explicitly defined in Title 10 "to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign." Further, the Marine Corps shall: (1) provide detachments and organizations for service on armed vessels of the Navy, (2) provide security detachments for the protection of naval property at naval stations and bases, and (3) perform such other duties as the President may direct.[68]

As mentioned above, the individual functions of the services are evolving as a result of the changing nature of the threats the United States is facing. Thus, it is obvious that given the broad language of Title 10, and the services' changing missions and functions, there is still some overlap in equipment and technology among the branches of the Armed Forces. This

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[64] KEY WEST AGREEMENT, *supra* note 12, at 1.

[65] *See Id.*

[66] 10 U.S.C. § 3062(b) (1994).

[67] *Id.* §§ 5062(a), 8062(c).

[68] *Id.* § 5063(a).

overlap assures the outstanding quality our Nation has come to expect from the military. It is also apparent that this debate over fundamental military changes is extremely important to the four services. Determining roles, missions and functions translates directly into power and resources -- "he who owns the mission owns the money and force structure needed to accomplish it."[69]

VII. ROLES & MISSIONS AND THE GOLDWATER-NICHOLS ACT

As an initial step toward a comprehensive review of roles and missions, the Goldwater-Nichols Act requires that the Chairman of the Joint Chiefs of Staff submit a report in not less than once every three years, recommending such changes in the assignment of functions (or roles and missions) as the Chairman considers necessary to achieve maximum effectiveness of the Armed Forces.[70] Accordingly, in 1989 and again in 1993, the Secretary of Defense received the *Report on Roles and Functions of the Armed Forces*, from then Chairmen of the Joint Chiefs of Staff Admiral William J. Crowe Jr., and General Colin L. Powell, respectively.

General Powell's 1993 report mentioned the many dramatic changes taking place in the United States' national security needs as a result of events including, most notably, the end of the Cold War. The report stressed, however, that conflict has not ended entirely and risks to American citizens and interests continued to exist around the world.[71] Nevertheless, Congress still believed the Department of Defense was too slow integrating the services and improving its efficiencies as the Goldwater-Nichols legislation had called upon it to do. Thus, further attempts have been made to review the roles and missions of the Armed Forces which have accelerated the debate among politicians, the individual branches of the Armed Forces and military analysts.

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[69] Maj John T. Hoffman, USMCR, *The Roles and Missions Debate*, MARINE CORPS GAZETTE, Dec 1994, at 16.

[70] 10 U.S.C. § 153(b) (1994).

[71] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, REPORT ON THE ROLES, MISSIONS, AND FUNCTIONS OF THE ARMED FORCES OF THE UNITED STATES, I-3, 4 (1993).

VIII. POST GOLDWATER-NICHOLS ATTEMPTS TO REVIEW ROLES & MISSIONS

In the National Defense Authorization Act for Fiscal Year 1994, Congress made several findings and conclusions which accelerated the roles and missions debate. Specifically, these findings include the following:

(1) The current allocation of roles and missions among the Armed Forces evolved from the practice during World War II to meet the Cold War threat and may no longer be appropriate for the post-cold War era.

(2) Many analysts believe that a realignment of those roles and missions is essential for the efficiency and effectiveness of the Armed Forces, particularly in light of lower budgetary resources that will be available to the Department of Defense in the future.

(3) The existing process of a triennial review of roles and missions by the Chairman of the Joint Chiefs of Staff pursuant to provisions of law enacted by the Goldwater-Nichols Department of Defense Reorganization Act of 1986 has not produced the comprehensive review envisioned by Congress.

(4) It is difficult for any organization, and may be particularly difficult for the Department of Defense, to reform itself without the benefit and authority provided by external perspectives and analysis.[72]

Based on these findings, Congress established the Commission on Roles and Missions of the Armed Forces (CORM).[73] The purpose of the Commission includes reviewing the current roles, missions, and functions, and making recommendations for changing the current structure among the roles, missions, and functions of the Armed Forces.

In accordance with section 954(b) of the National Defense Authorization Act for Fiscal Year 1994, a report entitled "Directions for Defense" was

[72] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547 § 951 (1993).

[73] *Id.* § 952.

presented to Congress by the CORM in May of 1995.[74] The Commission grouped its recommendations under three general themes: effective unified military operations, efficient and responsive support and improved management and direction.[75] According to the reports' authors, the CORM's goal was to shape America's military institutions so that they are better prepared for a changing and uncertain future. To accomplish this goal the Commission urged that the work begun by the Goldwater-Nichols Act of ensuring effective unified military operations through joint thinking and acting was a necessity.[76]

One of the CORM's recommendations recently adopted by Congress is the creation of a "Quadrennial Strategy Review."[77] The National Defense Authorization Act for Fiscal Year 1997, signed by the President into law on September 23, 1996, includes a requirement that "the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, shall complete in 1997 a review of the defense program of the United states intednded to satisfy the requirements for a Quadrennial Defense Review as identified in the recommendations of the Commission on Roles and Missions of the Armed Forces."[78] This comprehensive review is to include, among other items, an examination of defense strategy and force structure through the year 2005.[79]

Ten years after the enactment of Goldwater-Nichols, our leaders within the Department of Defense and Congress continue to struggle trying to optimize the efficiency of the Armed Forces. As expressed by the CORM, "[i]f America's experienced since the end of the Cold War is instructive, America's future will be marked by rapid change, diverse contingencies, limited budgets, and a broad range of missions to support evolving national security policies."[80] In trying to meet these challenges, our nation's military establishment is clearly on a path toward more unified military operations which began with Goldwater-

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[74] Report of the Commission on Roles and Missions of the Armed Forces, *Directions for Defense* (1995).

[75] *Id.* at ES-3.

[76] *Id.* at ES-9.

[77] *Id.* at 4-9.

[78] National Defense Authorization Act for Fiscal Year 1997, § 1093(a) (1996).

[79] *Id.*

[80] Report of the Commission on Roles and Missions of the Armed Forces, *supra* note 75, at ES-1.

Nichols. Continuing in this direction and stressing more effective, efficient and unified military operations is imperative to our future.

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Managing Editor